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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 753.

Strong

TAYLOR STRAUDER, PLAINTIFF IN ERROR,

vs.

THE STATE OF WEST VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

FILED MAY 3, 1879.

W. Va. Sec 3. Laws Act 1872 3 p. 726

Sec 2 17 1 p. 6

Sec 7 22 p. 103

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1 *Petition.*

Supreme court of appeals of West Virginia, Wheeling.

STATE OF WEST VIRGINIA }
vs. }
TAYLOR STRAUDER. }

To the honorable judges of the supreme court of appeals for West Virginia:

The petition of Taylor Strauder respectfully shows that on the 9th day of January, 1875, he was convicted and sentenced by the circuit court of Ohio County upon an indictment for murder, which said sentence is a sentence of death to be executed by the sheriff of said county on the 26th day of March, 1875, as will more fully appear by inspection of the transcript of the record accompanying this petition.

That your petitioner is aggrieved by the judgment and sentence of said court and respectfully asks that a writ of error may be awarded him; that the said judgment and sentence may be reviewed in
2 the supreme court of appeals. Your petitioner assigns for error the following causes appearing upon the transcript of the record aforesaid:

First. The court erred in not discharging the prisoner from custody, three terms having elapsed since he was imprisoned and no indictment having been found.

Second. The court should have quashed the indictment.

Third. The court should have granted the prayer of the petitioner (the prisoner) to have his cause removed to the circuit court of the United States.

Fourth. The court should have quashed the venire facias issued for the trial of this cause on the motion of the defendant.

Fifth. The court should have sustained the prisoner's challenge to the array of the panel and quashed the said panel.

Sixth. The court should have withdrawn the juror Edward Larkin after a discovery of his incompetency.

Seventh. The court erred in refusing to give the instruction to the jury asked for by the defendant.

Eighth. The court erred in giving the instructions he did to the jury in lieu of the instruction asked for by the prisoner.

3 Ninth. The court erred in not sustaining the prisoner's motion to set aside the verdict and grant him a new trial.

Tenth. The court erred in not sustaining the prisoner's motion in arrest of judgment.

Eleventh. And for other errors apparent upon the face of the said record.

TAYLOR STRAUDER,
By his counsel, DAVENPORT & DOVENER.

I, George O. Davenport, an attorney practicing in the supreme court of appeals of the State of West Virginia, do hereby certify that in my opinion there is error in the proceedings which appear upon the face of the transcript of the record accompanying this petition which ought to be reviewed by the supreme court of appeals.

GEO. O. DAVENPORT,
Residing in Ohio County, W. Va.

STATE OF WEST VIRGINIA, *to wit:*

The foregoing petition and assignment of errors of the petitioner, Taylor Strauder, was presented to me together with the transcript of
4 the record accompanying said petition (being a certified transcript of the record of the proceedings had in the circuit court of Ohio County, West Virginia, upon an indictment against said Taylor Strauder for murder) on this 9th day of March, 1875, in the vacation of the supreme court of appeals. And, upon consideration of said assignment of errors and the said transcript of the record in said cause, I, the undersigned judge of the supreme court of appeals, do award to the said petitioner, Taylor Strauder, a writ of error to the judgment of the said circuit court rendered in the said cause against the said Taylor Strauder on the 9th day of January, 1875, as prayed in the said petition of the said Taylor Strauder. The said writ of error so awarded by me to the said Taylor Strauder to the said judgment shall, when issued and served, operate as a stay of proceedings in said cause until the decision of the supreme court of appeals therein, according to the provisions of the 6th section of chapter 174 of the acts of the legislature of 1872 and 1873, approved the 19th day of December, 1873.

Given under my hand this 9th day of March, 1875.

A. F. HAYMOND,
Judge of the Supreme Court of Appeals.

To O. S. LONG,
Clerk of the Supreme Court of Appeals.

5 RECORD.

WEST VIRGINIA:

Pleas and proceedings before the circuit court of Ohio County on the ninth (9th) day of January, 1875.

Be it remembered that heretofore, to wit, at a circuit court held for the county of Ohio, at the court-house thereof, on the 20th day of October, 1874, there was found by the grand jury attending said court a true bill of indictment for murder against Taylor Strauder, which bill of indictment, with the endorsement thereon, is in the words and figures following, to wit:

Indictment.

THE STATE OF WEST VIRGINIA,
First Judicial Circuit, Ohio County, to wit:

In the circuit court of said county.

The jurors of the State of West Virginia in and for the body of the county of Ohio, and now attending the circuit court of the said county, upon their oaths present, that Taylor Strauder, on the 18th day of April,
1872, in the said county of Ohio, in and upon one Annie Strauder,
6 feloniously, wilfully, and of his malice aforethought, did make an assault, and that the said Taylor Strauder, with a certain hatchet in his right hand, then and there had and held, the said Annie Strauder in and upon the left temple of her, the said Annie Strauder, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, giving to the said Annie Strauder, then and there, with the hatchet aforesaid, in and upon the aforesaid left temple

of her the said Annie Strauder, one mortal wound, bruise, fracture, contusion, of the breadth of one inch and of the depth of one inch, of which said mortal wound, bruise, fracture, and contusion she, the said Annie Strauder, then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Taylor Strauder, her the said Annie Strauder, in the manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace and dignity of the State.

2. And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said Taylor Strauder, on the day and year afore-
7 said, in the county of Ohio aforesaid, in and upon one Annie Strauder, feloniously, wilfully, and of his malice aforethought, did make another assault, and that the said Taylor Strauder, with a certain hatchet in his right hand, then and there had and held, the said Annie Strauder, in and upon the left side of the head, one inch behind the ear of her the said Annie Strauder, then and there feloniously, wilfully, and of his malice aforethought, did strike, penetrate, and wound, giving to her the said Annie Strauder, then and there, with the hatchet aforesaid, in and upon the left side of the head, one inch behind the ear, of her the said Annie Strauder, one mortal wound, bruise, fracture, and contusion, of the breadth of one inch and of the depth of one-quarter of one inch, of which said mortal wound, bruise, fracture, and contusion she the said Annie Strauder then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Taylor Strauder, her the said Annie Strauder, in the manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace and dignity of the State.

3. And the jurors aforesaid, upon their oaths aforesaid, do fur-
8 ther present, that the said Taylor Strauder, on the day and year last aforesaid, in the county of Ohio aforesaid, in and upon one Annie Strauder, feloniously, wilfully, and of his malice aforethought, did make another assault, and that the said Taylor Strauder, with a certain hatchet in his right hand, then and there had and held, the said Annie Strauder, in and upon the left temple of her the said Annie Strauder, and in and upon the left side of the head, one inch behind the ear, of her the said Annie Strauder, then and there feloniously, wilfully, and of his malice aforethought, did strike and thrust, giving to the said Annie Strauder, then and there, with the hatchet aforesaid, in and upon the left temple of her the said Annie Strauder, one mortal wound, in and upon the left side of the head, one inch behind the ear, of her the said Annie Strauder, one other mortal wound, the first thereof of the breadth of one inch and of the depth of one inch, and the second thereof of the breadth of one inch and of the depth of one-quarter of one inch, of which said two mortal wounds she the said Annie Strauder then and there instantly died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Taylor Strauder,
9 her the said Annie Strauder, in the manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder against the peace and dignity of the State.

E. G. CRACRAFT,
Prosecuting Attorney for the County of Ohio aforesaid.

Found upon the information of Fannie Green, Barbara Sly, J. St. J. Clarkson, David Luker, R. H. Gillespy, and John Gillespy, witnesses

sworn in court, and by order of the court sent before the grand jury to give evidence.

(Endorsed:) The State of West Virginia vs. Taylor Strauder. Indictment for murder. A true bill.

ANDREW WILSON,
Foreman.

Entry in order-book of date last aforesaid: An indictment against Taylor Strauder for murder. A true bill.

ANDREW WILSON,
Foreman.

And at another day, to wit, at a circuit court held for the county of Ohio, at the court-house thereof, on the second day of November, 1874—

10 THE STATE OF WEST VIRGINIA *vs.* TAYLOR STRAUDER. } Upon an indictment for murder.

Taylor Strauder, who stands indicted as aforesaid, was this day led to the bar in custody of the jailor of this court, whereupon the prisoner moved the court to be discharged for the reason that three (3) terms of this court had passed since his commitment to jail for said offence before the finding of said indictment. He also moved the court to quash the indictment herein, and further moved the court to certify this cause to the circuit court of the United States for the 4th judicial circuit, and in support thereof filed his petition therefor, which motions, upon argument by counsel and consideration by the court, are refused. And thereupon the prisoner demurred to said indictment and to each count thereof, in which the State by her attorney joins, which demurrer is by the court, upon consideration by the court overruled. Whereupon the prisoner, for plea, says he is not guilty in manner and form as in the indictment against him is alleged, and of this he puts himself upon the coun-
11 t'y, and State doth the same. Whereupon came a jury, to wit, John Barr, Caleb Sylvis, C. Benter, M. Roth, James Kerr, N. Hunter, Jacob Heyman, H. Cohen, W. B. Lukens, A. Paxton, Ed. Larkin, and Joseph Emsminger, who were elected, tried, and sworn to well and truly try and true deliverance make between the State and the prisoner at the bar, and having partly heard the evidence, were adjourned over, with the usual instructions, in charge of the sheriff, until to-morrow morning at 9 o'clock. Thereupon the prisoner is remanded to jail.

And at another day, to wit, at a circuit court continued and held for the county of Ohio, at the court-house thereof, on the 3rd day of November, 1874—

THE STATE OF WEST VIRGINIA *vs.* TAYLOR STRAUDER. } Upon an indictment for murder.

Taylor Strauder, who stands indicted as aforesaid, was this day again led to the bar in the custody of the jailor of this court, and the jury in charge of the sheriff appeared, pursuant to their adjournment,
12 who, having fully heard the evidence and partly heard the arguments of counsel, were adjourned over, with the usual instructions, in charge of the sheriff, until to-morrow morning at 9 o'clock. Thereupon the prisoner is remanded to jail.

And at another day, to wit, at a circuit court continued and held for the county of Ohio, at the court-house thereof, on the 4th day of November, 1874—

THE STATE OF WEST VIRGINIA
vs.
TAYLOR STRAUDER. } Upon an indictment for murder.

Taylor Strauder, who stands indicted as aforesaid, was this day again led to the bar in the custody of the jailor of this court, and the jury, in charge of the sheriff, appeared pursuant to their adjournment, and having been sent to their room to consider of their verdict, after a time returned, and, being unable to agree, were adjourned over, with the usual instructions, in charge of the sheriff, until to-morrow morning at 9 o'clock, and thereupon the prisoner is remanded to jail.

13 And at another day, to wit, at a circuit court continued and held for the county of Ohio, at the court-house thereof, on the 5th day of November, 1874—

THE STATE OF WEST VIRGINIA
vs.
TAYLOR STRAUDER. } Upon an indictment for murder.

Taylor Strauder, who stands indicted as aforesaid, was this day again led to the bar in the custody of the jailor of this court, and the jury in charge of the sheriff appeared pursuant to their adjournment, and, having been sent to their room, after a time returned into court and on their oath do say: "We the jury find the prisoner guilty of murder in the first degree, as charged in the indictment. Michael Roth, foreman." Whereupon the prisoner moved the court to set aside said verdict and grant him a new trial herein, which is continued to a future day for consideration. Thereupon the prisoner is remanded to jail.

And at another day, to wit, at a circuit court continued and held for the county of Ohio, at the court house thereof, on the 9th day of January, 1875—

14 THE STATE OF WEST VIRGINIA
vs.
TAYLOR STRAUDER. } Upon a conviction for murder.

Taylor Strauder, who stands convicted as aforesaid, was this day again led to the bar in custody of the jailor of this court, and the court having maturely considered the prisoner's motion for a new trial herein refuses the same, and thereupon the prisoner prays that judgment or the verdict and conviction aforesaid may be arrested for reasons assigned, which, being argued by counsel and considered by the court, is refused. And it being demanded of the prisoner if anything further for himself he knew or had to say why the sentence of the court should not now be pronounced against him, and nothing being offered or alleged in delay thereof, it is considered by the court that he be hanged by the neck until he be dead, and that execution of this judgment be done upon him, the said Taylor Strauder, by the sheriff of Ohio County, on Friday, the twenty sixth (26th) day of March, 1875, between the hours of ten in the forenoon and four in the afternoon of the same day, at the usual place of execution in the vicinity of the city of Wheel-

15 ing, it appearing in the opinion of the court that there is no jail yard of sufficient size for said purpose. And thereupon the said Taylor Strauder is remanded to jail.

Upon the trial of this cause the prisoner excepted to opinions and rulings of the court given upon the trial, and tendered his bills of exceptions, which are signed and sealed, and ordered to be made a part of the record, which is accordingly done.

* * * * * * *

Bill of exceptions, No. 2.

STATE OF WEST VIRGINIA:

Circuit court of Ohio County.

STATE OF WEST VIRGINIA
vs.
TAYLOR STRAUDER. } Upon an indictment for murder.

Be it remembered that when this cause was called for trial, and before the trial commenced, on the day of , 1874, in the circuit court of Ohio County, W. Va., the defendant filed a petition praying that his cause might be removed to the circuit court of the United

16 States for reasons in said petition assigned, which said petition is in the words and figures following, to wit:

Circuit court for Ohio County. October term, 1874.

STATE OF WEST VIRGINIA
vs.
TAYLOR STRAUDER. } Indicted for murder.

To the honorable judge of said court:

The petition of Taylor Strauder, the above named defendant, respectfully represents unto your honor that he is a citizen of the United States, and was indicted at the October term, 1874, of the circuit court of Ohio County, for the alleged murder of Anna Strauder.

Your petitioner further represents that he is a person of color and was formerly a slave, and was emancipated by the result of the late rebellion.

Your petitioner avers that under the laws of Virginia and West Virginia, the relation of husband and wife was not recognized between slaves, and that an impression is general in this county and the adjacent ones, and throughout the whole State, that colored men are not entitled to the same protection in their marital relations as white men. That the defence of this petitioner will depend greatly upon the fact of

17 the petitioner having been a married man at the time the offence he is charged with was committed.

Your petitioner further avers that under and by virtue of the laws of the State of West Virginia no colored man is eligible to be a member of the grand jury or serve on a petit jury in this State, and that white men are so eligible, and your petitioner, by reason of his being a colored man and of his having been a slave, has reason to believe and does believe that he cannot have the full and equal benefit of all laws and proceedings in the State of West Virginia for the security of his person as is enjoyed by white citizens, and that he has less chance of

enforcing in the courts of this State his rights on this prosecution as a citizen of the United States, and that the probabilities of a denial of them to him as such citizen on every trial which might take place on this indictment in the courts of this State are much more enhanced than if he was a white man.

Your petitioner hereby offers to give good and sufficient security for his filing at the next circuit court of the United States for the 4th judi-
cial circuit, on the first day of its next session, copies of the pro-
18 cesses and proceedings in this case, and likewise offers to give bail for his appearance if your honor should discharge him from custody (your petitioner being a close prisoner.) Wherefore your petitioner, the said Taylor Strauder, prays your honor will make such orders in the premises as may be consonant to law and according to the form of the act of Congress in that behalf made and provided.

TAYLOR STRAUDER.

STATE OF WEST VIRGINIA,
Ohio County, to wit:

Taylor Strauder, the petitioner named in the foregoing petition, personally appeared before me, and being duly sworn, says that the facts and allegations therein contained are true.

TAYLOR STRAUDER.

Sworn to and subscribed before me, the undersigned, this 2nd day of November, 1874.

JOHN O. PENDLETON,
Notary Public.

But the court being of opinion that the said defendant was not entitled to have his cause removed to the circuit court of the United States for the reasons appearing in said petition, denied the prayer of the pe-
titioner and refused to certify this cause into the circuit court of
19 the United States, and compelled the said defendant to proceed to trial in the circuit court of Ohio County, West Virginia. To which opinion of the court denying the prayer of the said petitioner for the removal of his cause to the circuit court of the United States and compelling him to proceed to trial in the circuit court of Ohio County, West Virginia, the defendant excepted, and prayed that this his exception might be signed, sealed, and made a part of the record, which is done accordingly.

T. MELVIN. [SEAL.]

Bill of exceptions, No. 3.

STATE OF WEST VIRGINIA }
vs. }
TAYLOR STRAUDER. }

Be it remembered that before the trial of this cause the defendant moved to quash the venire facias and the return thereon, which are in the words and figures following, to wit:

The State of West Virginia, to the sheriff of Ohio County, greeting:

We command you that you summon thirty good and lawful men
20 of your county, duly qualified to serve as jurors, to be and appear before the judge of the circuit court of Ohio County on Monday,

the 19th day of October, 1874, to serve during the said term as jurors for the trial of causes, unless sooner discharged. And have then there this writ.

Witness, Samuel B. McColloch, clerk of our said court, at the court-house of our said county, this 18th day of September, 1874, and in the 12th year of the State of West Virginia.

SAMUEL B. McCOLLOCH,
Clerk.

List of jurors drawn by the undersigned September 18, 1874, to serve at the October term, 1874, of the circuit court.

1. John Branstroup, Triadelphia.
2. Martin Ewing, "
3. Brice Supler, "
4. Jabez Exley, Clay.
5. Theo. Darrah, "
6. H. N. Hirst, "
7. John Barr, Liberty.
8. D. Atkinson, "
9. Stephen Berry, "
10. Caleb Sylvis, Washington.
11. S. Welty, "
12. F. M. Porter, "
13. James Kerr, Madison.
14. Louis Keller, "
15. Samuel Kline, "

John Medick, Ritchie.
Louis Wagner, "
Edward Steele, "
W. E. Hughes, Webster.
J. M. Todd, "
Jos. Debold, "
Louis Meder, Centre.
Henry Roemer, "
Geo. Roth, "
J. B. Lyle, Richland.
Leonidas Bruner, "
W. F. Carter, "
Charles Kraus, Union.
Jacob Dick, "
Fred. Werner, "

ROBERT B. WOODS,
Clerk County Court.

SAMUEL B. McCOLLOCH,
Clerk Circuit Court.

Executed by summoning the following drawn jurors:

1. John Braustroup; 2. Martin Ewing; 3. Brice Supler; 4. Jabez Exley; 5. Theo. Darrah; 6. H. N. Hirst; 7. John Barr; 8. David Atkinson; 9. Non-resident; 10. Caleb Sylvis; 11. S. Welty; 12. F. M. Porter; 13. James Kerr; 14. Louis Keller; 15. Samuel Kline; 16. John Medick; 17. Louis Wagner; 18. Edward Steele; 19. W. E. Hughes; 20. J. M. Todd; 21. Joseph Debold; 22. Louis Meder; 23. Henry Roemer; 24. George Roth; 25. Not found; 26. Leonidas Bruner; 27. W. F. Carter; 28. Charles Kraus; 29. Jacob Dick; 30. Fred. Werner.

G. W. KENEDY, *D. S.*,
For R. S. BROWN, *S. O. C.*

OCTOBER 12, 1874.

Stephen Berry is no inhabitant of my bailiwick, nor found therein October 12, 1874.

G. W. KENEDY, *D. S.*,
For R. S. BROWN, *S. O. C.*

22 J. B. Lyle not found within my bailiwick.
October 12, 1874.

G. W. KENEDY, *D. S.*,
For R. S. BROWN, *S. O. C.*

Because the said writ was not issued according to law, was not formal, and was not issued for the trial of Taylor Strauder, the defendant in this cause; because the law under which it was issued was unconstitutional, null and void, and further because the return thereon was not made according to law. But the court overruled the said motion, and refused to quash the said venire facias, to which ruling of the court the defendant excepted, and prayed that his exception might be signed, sealed, and made a part of the record, which is accordingly done.

T. MELVIN. [SEAL.]

Bill of exceptions, No. 4.

Circuit court for Ohio County.

STATE OF WEST VIRGINIA
vs.
TAYLOR STRAUDER. } Indictment for murder.

Be it remembered that after the jury were summoned and im-
23 pannelled the defendant challenged the array of the pannel, which is in the words and figures following, to wit:

Circuit court for Ohio County.

STATE OF WEST VIRGINIA
vs.
TAYLOR STRAUDER. } Indictment for murder.

And now this day, to wit, on the 2nd day of November, 1874, comes as well the aforesaid Taylor Strauder as the State of West Virginia, and the jury impannelled, and being summoned, also came, and thereupon the said Taylor Strauder challenges the array of the pannel, because he says the said pannel was not summoned according to law; because there was no proper venire facias issued for the summoning of the said jury, and because the law under which the said jury was impannelled is unconstitutional and void because the defendant is a colored man, and this he is ready to verify, whereupon he prays judgment that the said pannel may be quashed. But the court refused to quash the pannel, and compelled the prisoner to go to trial with the jury thus impannelled, to which ruling of the court the defendant excepted and prayed that the said exception might be signed, sealed and made a part of the record, which is accordingly done.

T. MELVIN. [SEAL.]

24 * * * * * * * *

Bill of exception, No. 7.

Circuit court for Ohio County.

STATE OF WEST VIRGINIA
vs.
TAYLOR STRAUDER. } Indictment for murder.

Be it remembered, that after the jury had returned a verdict of "guilty of murder in the first degree" in this cause, the defendant moved the court to set aside the said verdict, and grant him a new trial

upon the several grounds set forth in the bills of exceptions herein, marked Nos. 1, 2, 3, 4, 5 and 6, and for the reasons that the facts proved, as shown by the certificate of the evidence herewith presented, would not support a verdict of murder in the first degree. (See statement of evidence filed herewith, marked certificate of evidence.) But the court overruled the said motion, and refused to grant the defendant a new trial, to which ruling of the court the defendant excepted and prayed that his exception might be signed, sealed and made a part of the record, which is accordingly done.

T. MELVIN. [SEAL.]

25 *Bill of exception, No. 8.*

Circuit court for Ohio County.

STATE OF WEST VIRGINIA
vs.
TAYLOR STRAUDER. } Indictment for murder.

And now, after verdict and before sentence, comes the said Taylor Strauder and prays that judgment may be arrested, and assigns for cause because of the uncertainty and insufficiency of the indictment; because the venire facias was informal and not issued according to law, and because there was no proper return thereon, because the jury were not properly sworn, and because it appearing from the record that the defendant was a man of color and was a slave emancipated by the late rebellion, and that he petitioned to have his cause removed to the circuit court of the United States for reasons appearing on the face of the petition, and because it appears from the record that since his arrest and commitment more than two terms of the circuit court had been held before the indictment on which he was tried was found, and the prisoner before pleading to said indictment moved the court to discharge him from custody for that cause; because the juror Edward Lar-
26 kin should have been withdrawn by the court at the time his incompetency was suggested by the prisoner, and for other manifest defects in the record appearing. But the court overruled the said motion and sentenced the defendant to be executed on the 26th day of March, 1875; to which ruling and sentence the defendant excepted, and prayed that this his exception might be signed, sealed and made a part of the record, which is accordingly done.

T. MELVIN. [SEAL.]

It is hereby stipulated and agreed that the annexed portion of the record in the case of the State of West Virginia against Taylor Strauder, in the circuit court of Ohio County, W. Va., is all of said record which presents anything which is necessary for the determination of the federal questions which may be presented in said cause or over which the Supreme Court of the United States could in any way have jurisdiction; and we further agree that the same is a true copy taken from the record in said cause as duly certified by the clerk of the circuit court of Ohio County.

ROB'T WHITE,
Att'y Gen'l for State of West Virginia.
GEO. O. DAVENPORT,
Cou's'l for Taylor Strauder.

27 WEST VIRGINIA, *to wit:*

At a supreme court of appeals held in the city of Wheeling, on the 12th day of June, 1877.

THE STATE OF WEST VIRGINIA, PLAINTIFF below, defendant in error,
vs.
TAYLOR STRAUDER, DEFENDANT BELOW, plaintiff in error.

Upon a writ of error to a judgment of the circuit court of Ohio County rendered on the 9th day of January, 1875.

This day came the plaintiff in error by Davenport & Dovener, esqs., his attorneys, and the defendant in error by the honorable Robert White, attorney general, and this cause was fully heard upon the transcript of the record of the judgment aforesaid and the arguments of counsel thereon, but the court not being advised of its judgment to be given, time is taken to consider thereof.

28 And at another day, to wit, at a special term of the supreme court of appeal, held in the city of Wheeling on the 24th day of November, 1877—

THE STATE OF WEST VIRGINIA, PLAINTIFF below, defendant in error,
vs.
TAYLOR STRAUDER, DEFENDANT BELOW, plaintiff in error.

Upon a writ of error to a judgment of the circuit court of Ohio County, rendered on the 9th day of January, 1875, in a prosecution by the State of West Virginia against the plaintiff in error for felony, whereby it was considered that the said plaintiff in error be hanged by the neck until he be dead on Friday, the 26th day of March, 1875, between the hours of 10 in the forenoon and 4 in the afternoon of the same day.

This day came again as well the plaintiff in error, by his counsel, as the attorney general on behalf of the State of West Virginia,
29 and the court, having maturely considered the transcript of the record of the judgment aforesaid and the arguments of counsel thereon, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the said judgment. Therefore it is considered that the judgment rendered in this cause by the circuit court of Ohio County, on the 9th day of January, 1875, be and the same is hereby affirmed; and the day fixed for the execution of the said judgment having passed, the case is remanded to the said circuit court of the county of Ohio for another day to be fixed by that court for execution of the said judgment to be had and done upon the said plaintiff in error according to law. Which is ordered to be certified to the circuit court of Ohio County.

I, O. S. Long, clerk of the supreme court of appeals of West Virginia, hereby certify that the foregoing is a copy from the record of so
30 much of the proceedings had in said court of appeals in the case of the State of West Virginia, plaintiff below, defendant in error, against Taylor Strauder, defendant below, plaintiff in error, as the counsel for said plaintiff in error deems material to be transcribed. And I further certify that a printed copy of the transcript of record of proceedings had in the circuit court of Ohio county, West Virginia, in the

aforesaid case, the petition for writ of error, and the order allowing the same, upon which the said case was heard in the said supreme court of appeals, is annexed hereto.

In testimony whereof I have hereunto set my hand and affixed the seal of the said supreme court of appeals this 31st day of December, 1877, and in the 15th year of the State.

[SEAL.] O. S. LONG, *Clerk.*

31 To the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States:

Your petitioner, Taylor Strauder, humbly represents unto your honor, that on the 24th day of November, A. D. 1877, a final judgment was rendered by the supreme court of appeals of the State of West Virginia, at a special term thereof held in the city of Wheeling, in said State, on said day, against your petitioner in a criminal proceeding, in which your petitioner was defendant below and plaintiff in error, and the State of West Virginia was plaintiff below and defendant in error.

Your petitioner further represents that in the said suit there was drawn in question the validity of a statute of the United States, and where a right and privilege under the Constitution and statute of the United States was specially set up and claimed, and that the decision of the said court in the said suit was against the validity of such statute, and the right and privilege specially set up; and there was also drawn in question the construction of certain clauses of the Constitution of the United States, and that the said decision was against the right and privilege specially set up and claimed under such clauses of the said
32 Constitution; and that there was error in the said judgment of the said supreme court of appeals of the State of West Virginia, that being the highest court in said State having jurisdiction of the said suit.

Your petitioner is advised that he is entitled to have the same reviewed and corrected by the Supreme Court of the United States, and respectfully represents to your honor that there is error in the said judgement of the said supreme court of appeals of the said State of West Virginia; in that the said decision respecting the said statutes and the said clauses of the said Constitution of the United States was rendered against, instead of in favor of, your petitioner, as will more fully appear by inspection of the transcript of the record in said cause accompanying this petition.

Wherefore your petitioner prays your honor to allow him a writ of error to the said supreme court of appeals of West Virginia, so that the said suit and the said judgement and decision therein may be caused to come before the said Supreme Court of the United States, when the whole matter in said suit may be reviewed. And your petitioner will ever pray, &c.

TAYLOR STRAUDER,
Petitioner,
By GEO. O. DAVENPORT,
Counsel.

(Indorsed:) Taylor Strauder vs. The State of West Va. Petition for writ of error.

33 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of appeals of the State of West Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Taylor Strauder, plaintiff in error, and The State of West Virginia, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such
34 their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Taylor Strauder, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the sixteenth day of April, in the year of our Lord one thousand eight hundred and seventy-eight.

[SEAL.] D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

M. R. WAITE,
Chief Justice Sup. Court U. S.

35 A copy of the within writ was lodged in the clerk's office of the supreme court of appeals of West Virginia on the 18th day of April, 1878.

Attest:

O. S. LONG, *Clerk.*

The answer of Thomas C. Green, president of the supreme court of appeals of West Virginia, to the within writ.

The record and process whereof mention is therein made are in the words and figures in the transcript of said record herewith returned under seal of said court.

THOMAS C. GREEN,
President of Sup. C't of Appeals of West Virginia.

WHEELING, W. VA., *April* 18, 1878.

36 Know all men by these presents that we, Geo. O. Davenport and Thomas Shallcross, both of Wheeling, West Virginia, and Ward H. Lamon, of Martinsburg, West Va., are held and firmly bound unto the State of West Virginia in the full and just sum of two hundred and fifty dollars to be paid to the said State of West Virginia, her certain attorney, administrators, or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals, and dated this sixteenth day of April, in the year of our Lord one thousand eight hundred and seventy-eight.

Whereas lately at a supreme court of appeals of the State of West Virginia, in a suit depending in said court, between Taylor Strauder, plaintiff in error, and The State of West Virginia, defendant in error, judgment was rendered against the said Taylor Strauder, and the said Taylor Strauder having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of West Virginia citing and admonishing her to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Taylor Strauder shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) GEO. O. DAVENPORT. [L. S.]
(Signed) WARD H. LAMON. [L. S.]
(Signed) THOS. P. SHALLCROSS. [L. S.]

Sealed and delivered in presence of—

Approved by—
(Signed) M. R. WAITE,
Chief Justice U. S.

37 UNITED STATES OF AMERICA:

SUPREME COURT ROOM,
Washington, Dist. of Col.

We, George O. Davenport, Ward H. Lamon, and Thomas Shallcross, whose names are signed to the within bond, after being severally sworn, each for himself, says and swears that he is worth the sum of two hundred and fifty dollars after all debts due or owing by him are paid, and all liens or charges against him or his property may be discharged.

(Signed) GEORGE O. DAVENPORT.
(Signed) WARD H. LAMON.
(Signed) THOS. P. SHALLCROSS.

Sworn to before me this 16 April, 1878.
(Signed) D. W. MIDDLETON, *Clerk.*

The original bond of which the within is a copy was filed in the clerk's office of the supreme court of appeals of West Virginia on the 18th day of April, 1878.

Attest:

O. S. LONG, *Clerk.*

38 The United States of America to the State of West Virginia, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error, filed in the clerk's office of the supreme court of appeals of the State of West Virginia, wherein Taylor Strauder is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this sixteenth day of April, in the year of our Lord one thousand eight hundred and seventy-eight.

M. R. WAITE,
Chief Justice U. S.

39 Service of this process upon the undersigned as attorney general of the State of West Virginia is acknowledged.

ROB'T WHITE,
Atto. Gen'l.

AP'L 18, '78.

Service of the within process acknowledged.
May 4th, 1878.

HENRY M. MATHEWS,
Gov'r of West Va.

(Indorsement on cover:) No. 753. Taylor Strauder, plaintiff in error, vs. The State of West Virginia. West Virginia sup. c't of appeals. Filed 3rd May, 1879.

When the application for removal was made, as well as when the trial took place, the act of March 3, 1875 had not been passed — 18 Stat. at Large 335.

But the Statute of West Virginia when the indictment was found & when the trial took place, excluded the colored race from the jury, grand or petit — & so was the colored man thereby denied the full and equal benefit of the laws for the security of persons & property as was enjoyed by white citizens of the U.S

Supreme Court of the United States.

No. 753.

BRIEF FOR PLAINTIFF IN ERROR.

TAYLOR STRAUDER, PLAINTIFF IN ERROR,

VS.

STATE OF WEST VIRGINIA.

In Error to the Supreme Court of Appeals of the State of West Virginia.

IN THE

Supreme Court of the United States.

NO. 753.

TAYLOR STRAUDER, plaintiff in error,
vs.
THE STATE OF WEST VIRGINIA,

In error to the Supreme Court of Appeals of the State of W. Va.

Taylor Strauder, a colored person, was indicted in the Circuit Court of Ohio county, West Virginia, on the 20th day of October, 1874, for the murder of Anna Strauder (his wife), also a colored person, and on the same day [redacted] the cause was contined until a future day of the term, to-wit: the 2d day of November, at which time the cause came on to be heard, and the plaintiff in error then filed his petition praying that the cause be removed to the Circuit Court of the United States for the Fourth Judicial Circuit; but the Court denied the prayer of the petitioner and refused to certify his cause, as prayed for in said petition, to the said Circuit Court of the United States, and compelled the plaintiff in error to proceed to trial in the Circuit Court of Ohio County, West Virginia, to all of which, exceptions were duly taken (see Record, bill of exception No. 2, page 6). Plaintiff in error then moved to quash the *venire facias*, which, motion was overruled and excepted to (see bill of exception No. 3, pages 7, 8 and 9 of Record), and also challenged the array of the panel, which challenge the Court overruled, and signed the bill excepting to said ruling (see bill of exception No 4, page 9 of the Record). The court then compelled the plaintiff in error to proceed to trial, and the jury having found him guilty, he moved for a new trial and for the grounds of his motion suggested the objections heretofore made, which motion the Court overruled and

IN THE

Supreme Court of the United States.

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exception was taken thereto. (See bill of exception No. 7, page 9 of the Record.) The defendant then moved in arrest of judgment, which motion was also overruled by the Court, and exception taken thereto (see bill of exception No. 8, page 10 of the Record), and the Circuit Court of Ohio county proceeded to render judgment and sentence upon the said plaintiff in error, prescribing the death penalty and ordered the said sentence to be executed on the 26th day of March, 1875.

A writ of error having been granted to the Circuit Court of Ohio county, West Virginia, upon the petition of the plaintiff in error, by the Supreme Court of Appeals of the State of West Virginia, which Court, on the 24th day of November, 1877, affirmed the judgment of the said Circuit Court of Ohio county. (See Record, page 11.) A writ of error having been granted to the Supreme Court of Appeals of the State of West Virginia) the plaintiff in error submits the following:

First. That it was Error in the Circuit Court of Ohio county, West Virginia, to refuse to grant the petition of plaintiff in error, and remove his cause to the Circuit Court of the United States, for the Fourth Judicial Circuit. That the petition and affidavit of plaintiff in error made a proper case for such removal, there can be no doubt.

By the act of the Legislature of West Virginia, passed March 12th, 1863, it was *provided*,

"Section 1. All *white* male persons who are twenty-one years of age and not over sixty, and who are citizens of this State, shall be liable to serve as jurors," except as hereinafter provided. (See Acts of the Legislature of West Virginia, for the years 1872-3, page 102, ch. 47, sec. 1.) The second section of said chapter excepted State officials and others, and is as follows:

"Section 2. The Governor of the State, practicing attorneys and physicians, officers of any court, all telegraph operators actively engaged as such in any office in this State, and all persons mentioned in the 2d and 4th sections of chapter 19, as exempt from military duty, (except school commissioners, persons exempted under the second section by reason of having relatives dependent upon them for support, or in the military service of the United States, or in this State, officers of the militia who resign their commissions after serving seven years successively, and officers and members of a uniformed and armed volunteer company, who shall have served three years,) shall be exempt from serving on juries."

This section contains all the exceptions to the first section. This statute was, if of any validity, in full force when the plaintiff in error was tried, and at the time he filed his petition for the removal of his cause to the Circuit Court of the United States, and is *now*, and has been, since the passage of said statute.

On the 9th day of April, 1866, Congress passed an act entitled "an Act to protect all persons in the United States in their civil rights, and furnish the means of their vindication." (See 14 Stat. at large, chap. 31; page 27, sections 1 and 3.)

The first section of the act declares, "all persons born in the United States, and not subject to any foreign power, excluding Indians not taxed, to the citizens of the United States;" and it enacted that such citizens of every race and *color*, shall have the same rights in every State and Territory in the United States, to make and enforce contracts, to sue and be sued, be parties and give evidence, to inherit, lease, sell, hold and convey real and personal property, and to full and equal benefit of all *laws and proceedings for the security of persons and property as is enjoyed by white citizens*, and shall be subject to like punishment, pains and penalties, and to no other, any *law, statute, ordinance, regulation or custom to the contrary notwithstanding.*

Section 3 confers exclusive jurisdiction upon the courts of the United States in all cases, *civil and criminal, affecting persons* who are *denied* or cannot enforce in the *State courts* any of the rights secured to them by section 1st, and provides for the removal from the State courts of such causes upon affidavit, &c. This act was passed in pursuance of the 5th section of the 14th amendment to the Constitution of the United States, which section provides that Congress shall have power to enforce by appropriate legislation the provisions of the fourteenth amendment. The purpose of that amendment and the reason for its adoption, are so well known that it is entirely unnecessary to advert to them—all agreeing that the purpose of the amendment could not be more fully expressed than in the words of the section itself, which, after defining who are citizens, is in the following words: "No State shall make any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

The act known as the civil rights law has been decided to be constitutional in the case of the United States *vs.* John Roads, *et. al.*, [1st Abbott's United States 29.] This is the first reported case where

the act received judicial construction. The Court held that the civil rights law gave to colored persons everywhere the same right to testify "as is enjoyed by white citizens," and that the United States Courts had jurisdiction in all cases, civil and criminal, which concern the colored man, wherever the right to testify equally with the white is denied him, or cannot be enforced by the State tribunals. The right to trial by jury is guaranteed to every citizen of the State of West Virginia by the constitution of the State; but men of color are not permitted to be jurors. The convention that framed the constitution, it is apparent from that instrument, intended that there should be no such distinction, from the fact that they permitted colored citizens to hold office.

By the Constitution of West Virginia, Article II, section 3, it is declared:

"All persons residing in this State, born, or naturalized in the United States, and subject to the jurisdiction thereof, shall be citizens of this State."

After declaring who are citizens, Article IV, section 1, prescribes who are entitled to vote, as follows:

"The *male* citizens of the State shall be entitled to vote at all elections held within the counties in which they respectively reside; but no person who is a minor, or of unsound mind, or a pauper, or who is under conviction of treason, felony, or bribery in an election, or who has not been a resident of the State for one year, and of the county in which he offers to vote for sixty days next preceding such offer, shall be permitted to vote, while such disability continues; but no person in the military, naval, or marine service of the United States, shall be deemed a resident of this State by reason of being stationed therein."

Section 4 of the same article reads as follows:

"No person, except citizens entitled to vote, shall be elected or appointed to any State, county, or municipal office; but the Governor and Judges must have attained the age of thirty, and the Attorney-General and Senators the age of twenty-five years, at the beginning of their respective terms of service; and must have been citizens of the State for five years next preceding their election, or appointment, or be citizens at the time this Constitution goes into operation."

No exceptions, to the right to hold office, are anywhere made in the Constitution and laws of the State which debars any one from holding office on account of race, color, or previous condition of servitude, so that a colored man may, if elected or appointed, be a *judge*, *clerk* or

sheriff, but he *cannot* serve on a jury. Is not, it is submitted, the denial of a colored man the privilege of having one of his own color on a jury, or requiring him to select a jury of white men from a panel made up by the law of the State exclusively of white men, and on which no colored man can sit, a denial of a *right which white men enjoy*, and a *distinction* in the selection of jurymen for the trial of his cause on account of *color?* The right of a trial by jury has been considered one of the most sacred a citizen enjoys, and the right to be tried by a jury of our peers, "a jury of the vicinage." These terms are intended to imply a jury of our class, our fellows, our neighbors, those who have interests in common with us, is the very essence of the jury system, [see 1 Black.] a jury selected, summoned and impanneled in such manner as the laws of the State may direct, except that no distinction shall be made between citizens on account of "race, color or previous condition of servitude."

In Virginia, in former days, an *alien* was entitled to a jury, *de medietate linguæ*. [1 Rev. Code, p. 26.] This was also the practice in New York and Pennsylvania—[see Rob. Old, Prac. 3d vol. 152]—and was the law of England.

27 Ed. III, c. 13.

It is not enough to say that the negro is our peer and then deprive him, by reason of his color, from all that protects him. The right to have his cause tried by his fellows, or under a law that does not discriminate against him, is a greater protection to his rights and liberty than the right to hold office.

Blackstone says that "the right to trial by jury of the country *per patriam* is a trial by the peers of every Englishman, and is the grand bulwark of his liberties, and is secured to him by the great charter." And again he says, "the truth of every allegation in an indictment should afterward be confirmed by the unanimous suffrage of twelve of his equals and neighbors, *indifferently* chosen and *superior to all suspicions.*"

A prisoner at the bar has the *right* to have the jury, his triers, selected from the largest body of citizens that may be qualified to sit as jurors in his case, and any law that circumscribes that right on account of color to a less number, to that extent, is an infringement of his rights accorded to him by the constitution of the United States. To illustrate, the County of Ohio has within its limits 5,000 male persons who are twenty-one years of age and not over sixty, who are not

subject to any exceptions mentioned in section 2, chapter 47 of the jury law of West Virginia, above quoted. But of that number only 3,000 are possessed of the necessary qualifications mentioned in the first section of the act, *i. e.*, *White* male citizens. The word *white* deprives the prisoner of the right of having the jurors for the trial of his cause summoned indifferently from the body of the county, and all the citizens possessing the necessary qualificatons except a *white* skin, but requires him to select his jury from a body of men 2,000 less in number and among which no man of his own race can be found, and these 2,000 are excluded wholly and solely on the grounds of race and color. That this privilege of the defendant, in a criminal prosecution, to have his triers selected from the largest number of citizens qualified to act as jurors, is a *right*, and one which he cannot be deprived of, is clearly decided in the caase of *Commonwealth* vs. *Wash*, 16 *Grat.* 537 *and* 538.

The Court in that case said:

"The summoning officer has been required to exclude from the jury those who by law the prisoner was entitled to have as his triers. If the writ may thus limit the range of selection, the trial of offenses would be limited to such persons as the clerk thought proper to designate. No such power has been entrusted to any such functionary, and not being authorized by law, the court erred in not granting the motion to quash."

In this case the clerk and the summoning officer were required to exclude from the jury summoned to try the cause all persons of the same race or color of this plaintiff in error, and on his failure to do so was liable to be fined by the Court. The language of section 5, chapter 47, of the Acts of 1872-3, above mentioned, is as follows:

"If any sheriff fail to summon jurors according to the preceding section, or shall knowingly summon persons not qualified to serve, or exempt from serving as jurors, he shall be fined by the court not exceeding twenty dollars."

It may be said that the jury service is a duty which a citizen owes to the State and not a right, but with respect to third persons or parties on trial, it is submitted that his fellows or race, being otherwise qualified as jurors, cannot be excluded from the jury box on account of race or color, and he deprived on that account of an opportunity to have jurors of his own race or color who might happen to be summoned on a jury indifferently selected, without regard to race or color.

In the case of State *vs.* Dunlap, [Am. Law Times R. p. 205,] the

Supreme Court of North Carolina held that an affidavit by a colored man in a criminal cause pending in the State Court, setting forth in substance, that by reason of his *color* and previous condition of servitude he cannot obtain justice in the courts of the State, entitles him to have his cause removed into the United States Court. It was decided, not because the laws of North Carolinia made any distinction, as in this State, but because the petitioner was a man of color, had been a slave, and the people of North Carolina were prejudiced against him for that reason.

The prisoner's petition and affidavit for removal of his cause, set forth the fact uncontradicted, that he cannot have the full and equal benefit of laws and proceedings in the State of West Virginia, as are enjoyed by white citizens, and that he has less chance of enforcing his rights in the State of West Virginia, as a citizen of the United States, on the prosecution then pending against him, and that the probability of a denial of them to him as such citizen on every trial which might take place in said court, were more enhanced than if he was a white man; that these allegations were true, cannot be denied in face of the fact, that the Legislature of West Virginia had, by law, prohibited any of his race or color from being jurors.

In the *Slaughter House Cases*, [16 Wal. 27,] the Supreme Court of the United States construed the 13th and 14th amendments to the Constitution of the United States; but the question now under consideration was not decided. [16 Wal. 81.] They, however, did construe the clause which forbids a State to deny to any person the equal protection of the laws, and decided that it was clearly intended to prevent the hostile discrimination against the negro race, so common in the States in which he had been a slave; and for this purpose the clause confers ample powers on Congress to secure his rights and his equality before the law. To the same effect is the case of Barkmeyer *vs.* State of Iowa, [Am. Law Reg. April 1874, p. 220,] which was considered by the court at the same time, but was not reported for some time afterward.

In the case of State *vs.* Gibson, [36 Ind. 389—S. C. 10th Am. Rep. 42,] the court decided a State law forbidding the marriage contract to be entered into between the white race, was not abrogated by the civil rights act, or the 14th amendment, this being clearly a State regulation which could not in any way affect the right of any person within the meaning of the act or the amendment, for the reason to no privi-

ege is granted or denied the white that is enjoyed or refused the colored race.

In West Virginia, a negro, on account of color, can have no one of his own race, who understands his impulses, his habits, his motives or customs, to sit upon a jury, because the law excludes them from the jury box by reason of color; while the *white* man has the full benefit of these advantages in all the laws and proceedings for the security of his person and property.

The right secured by law to a fair and impartial jury, with minds open to receive and weigh the evidence, and balanced with regard to the matters to be tried, is of the highest importance and should be carefully guarded in the courts, especially in cases involving human life. This plaintiff in error was charged with the murder of his wife. His own race, that could more properly weigh and understand and appreciate the marital relations, impulses, habits, customs, &c., are excluded by the law of his State from the jury box, and on account of *color*, and he is compelled to accept triers from another race in a State that heretofore have not recognized the marital relations of the negro.

The plaintiff in error was tried and sentenced on the 9th day of January, 1875. (See Record, page 11.) Congress was in session at that time and passed an act to "protect all citizens in their civil and legal rights."

It is enacted by the 4th section of that act "That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States or of any State, on account of race, color or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors, who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars."

It was decided in the *Slaughter House Cases*, 16 *Wall.* 81, that the clause in the fourteenth amendment to the Constitution of the United States which forbids a State to deny to any person the equal protection of the laws, was clearly intended to prevent the hostile discrimination so familiar in the States where he had been a slave, and for this purpose the clause confers ample power on Congress to secure his rights and his equality before the law.

The case of the *United States* vs. *Reeves*, 2 Otto. 214, decides that

the rights and immunities created by or dependent upon the constitution of the United States can be protected by Congress.

The third and latter clause of the 14th amendment reads: "Nor shall any state deprive *any* person of *life, liberty or property*, without due process of law, nor deny to *any* person within its jurisdiction, the equal protection of the law."

Section 1977 of the Revised Statute of the United States, 348, title "Civil Rights," in force at the time the plaintiff in error filed his petition for the removal of his cause to the United States Circuit Court, is as follows: "*All persons* within the jurisdiction of the United States, shall have the same right in every state and territory, to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as enjoyed by white citizens, and shall be subject to like pains, penalties, taxes, license and exactions of every kind, and to no other.

It will be observed that *any* person is protected by the act, in the equal benefits of all laws, proceedings, &c., which are enjoyed by white persons, and whenever any person, and especially *on account of color*, is denied the *full and equal benefits of all laws and proceedings* for the security of his person and property, that are enjoyed by *white* citizens, the case is within the amendment.

It is not contended that a colored man has a right to a jury exclusively composed of his own race, and it may be even composed in part of his own race, but we do say, that the constitution guarantees to him the right to have a jury summoned for the trial of his cause, indifferently selected from all the citizens qualified in other respects as jurors, and that he shall not be deprived of the opportunities which he might have of securing men of his own race or color, if he desire, who may be summoned or placed on the jury to try his cause. In other words, that when a jury is summoned to try his cause, it shall be summoned in accordance with state laws, that in no wise conflict with the constitution of the United States, its amendments, and the laws made in pursuance thereof. That he has a right to a trial by jury, indifferently selected, without respect to color, and that right cannot be abridged in any manner by any law of a state, which deprives him of an opportunity to secure a jury selected from all classes of citizens, otherwise qualified to act as such, without regard to race, color, or previous condition of servitude, and any law of a state, or proceeding which deprives him of that right in a state court, denies him the equal

protection of the laws, abridges his privileges, &c., and entitles him to have his cause removed to the Circut Court of the United States for trial therein.

We think the amendments to the constitution referred to, are intended to protect against disabilities and legal impediments to the free exercise of the rights secured, and not to permit infringement of those rights by prejudice, or otherwise created by legislation.

In the case of Anderson, from Louisiana, the Court refused the writ because the petition and facts did not show that Anderson was prejudiced by virtue of any law or legislation of the State of Louisiana on the subject. It is submitted, that the legislation on the subject in the State of West Virginia, does prejudice the rights of colored citizens, by reason of their color, who are being tried.

All of which is respectfully submitted.

DAVENPORT & DOVENER,
Of Counsel for Plaintiff in Error.

IN THE

Supreme Court of The United States.

TAYLOR STRAUDER, Plaintiff in Error,

vs.

THE STATE of WEST VIRGINIA, Deft. in Error.

No. 753.

In Error to the Supreme Court of Appeals of the State of West Virginia.

Nullus liber homo capiatur, vel imprisonetur, aut disseisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legum terræ.—*Magna Charta.*

CHARLES DEVENS.
W. WILLOUGHBY. } Of Counsel for Plaintiff in Error.

ALEXANDRIA, VA.
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IN THE

Supreme Court of The United States.

TAYLOR STRAUDER, Plaintiff in Error,

vs.

THE STATE of WEST VIRGINIA, Deft. in Error.

No. 753.

In Error to the Supreme Court of Appeals of the State of West Virginia.

Nullus liber homo capiatur, vel imprisonetur, aut disseisietur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legum terræ.—*Magna Charta.*

Brief of Plaintiff in Error.

The plaintiff in error, who is a colored man, was indicted for murder by the Circuit Court of Ohio county, in West Virginia, Oct. 20th, 1874. (Record p. 2.)

Having been convicted and sentenced to be hanged, writ of error was applied for to the Supreme Court of Appeals, which having been granted, the cause was there heard, and upon such hearing the judgment of the Circuit Court of Ohio county was affirmed and its sentence directed to be executed. (Record p. 11.) The opinion of the

Court upon such hearing will be found in the case of Strauder *vs.* West Virginia. 11 West Va. Reports.

Thereupon writ of error to said Court has been granted by this Court.

When the cause was called for trial, and before it commenced, the plaintiff filed a petition praying for the removal of the cause to the Circuit Court of the United States, assigning as one of the grounds thereof, that "by virtue of the laws of the State of West Virginia, no colored man is eligible to be a member of the grand jury, or to serve on a petit jury in this state, and that white men are so eligible, and your petitioner by reason of his being a colored man, and of his having been a slave, has reason to believe and does believe that he cannot have the full and equal benefit of all laws and proceedings in the state of West Virginia, for the security of his person as is enjoyed by white citizens" &c. (Record p. 6.)

The Court denied his right to have the cause removed and proceeded with the trial.

Motion was then made to quash the *venire facias* "because the law under which it was issued was unconstitutional, null and void," which motion was denied. (Record p. 9.)

The plaintiff in error then challenged the array of the pannel for the same reason, but the Court refused to quash the pannel. (Record p. 9.)

After the verdict he moved for a new trial, and also in arrest of judgment for the same reasons, which motions were denied. (Record p. 10.)

These motions and the action of the Court were made matter of record by bills of exception.

The law of West Virginia in relation to juries under which the said jury was empannelled, passed March 12, 1873, Ch. 47 Sec. 1, p. 102, Acts of 1872–3, is as follows:

"All *white* male persons who are twenty-one years of age and not over sixty, and who are citizens of this state, shall be liable to serve as jurors except as herein provided."

The Second Section excepts state officials.

The plaintiff in error assigns as errors the following, to wit:

1st. The Court erred in denying the motion to quash the *venire facias.*

2d. The Court erred in refusing to quash the pannel upon the challenge to the array.

3d. The Court erred in denying the motion for a new trial.

4th. The Court erred in denying the motion in arrest of judgment.

5th. The Court erred in denying the right to have the cause removed upon the filing of the petition for removal to the United States Court, and in thereafter proceeding with the trial of the cause.

Articles four and five of the Fourteenth Amendment to the Constitution provide that

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

"The Congress shall have power to enforce by appropriate legislation the provisions of this article."

Section 1977 of the Revised Statutes provides as follows:

"All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, *and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens*, and shall be subject to like *punishment*, pains, *penalties*, licenses, and exactions of every kind and to no other."

Section 641 Revised Statutes provides as follows:

"When any civil suit or *criminal prosecution* is commenced in any State court for any cause whatsoever against any person who is denied, or *cannot enforce*, in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, *any right secured to him by any law providing for the equal civil rights of citizens of the United States or of all persons within the jurisdiction of the United States* * * * such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts, and verified by oath, be removed for trial into the next Circuit Court to be held in the district where it is pending. Upon the filing of such petition, all further

proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided."

Section 642 provides for the issuing of a writ of *habeas corpus cum causa*, to be issued by the Circuit Court upon the above state of facts, where the defendant is in the custody of the State court under its process.

Section 722 of the Revised Statutes of the United States provides:

"The jurisdiction in civil and criminal matters conferred on the District and Circuit Courts by the provisions of this title, and of title 'Civil Rights,' and of title 'Crimes,' for the protection of all persons in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the constitution and laws of the United States, shall be extended to, and govern the said courts in the trial and disposition of the said cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

An act of Congress of March 3, 1875, 18 Statutes-at-Large, p. 335, provides:—

"That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States *or of any State* on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars."

The principal questions involved in all of these assignments of error are—

1st. Whether under the Fourteenth Amendment to the Constitution and the statutes purporting to have been enacted in pursuance thereof: *every citizen of the United States has a right to a trial by a jury constituted without discrimination against the race and color to which he belongs?*

2nd. If he is denied such right by the State has he, as a remedy

therefor, the right upon complying with the requirements of such statutes to have the cause removed to the Circuit Court of the United States?

It is not for a negro jury that we are contending, nor is it our specific claim that negroes shall constitute a part of the jury. It is simply that the jury should be empannelled without discrimination against the race of the accused, just as, if the accused were a white person, we would contend against a discrimination against *his* race.

The objection is made that negroes have the same juries as white men, and that they therefore have equal civil rights with them. Let us see how this is. *White men may have a jury of their own race and color, negroes cannot.* Under the system of juries permitted by the State, such a thing could not occur in a case of a white man charged with crime.

Suppose the case to be reversed, that a white man is charged with the murder of a negro, it may be, as often happens, under circumstances calculated to excite the prejudice of race against race, that a negro is a person who has charge of the selection of juries, and that he thereupon proceeds to make up a list entirely of negroes, discriminating against the white race. Would this be considered equal and fair? Does not such an illustration show that a discrimination in the selection of juries on account of race or color, is a denial of the "equal protection of the laws?" By this system, white men and negroes are not equally treated. One has a jury of his own race; the other does not. One cannot be subject to the prejudice against him on account of his race or color; the other may be. It was just this discrimination which the Fourteenth Amendment was designed to prevent.

But it is argued that a State may prescribe the qualifications of its own jurors, as for example, that only men or adults may be allowed upon a jury, or only freeholders, etc., and that in such cases, a woman might as well complain that a discrimination is made against her sex, or an infant, that a discrimination is made against infants, or one without property that none of his class could sit upon the jury for the trial of his cause.

But this argument ignores the principles upon which the Fourteenth Amendment was based. That was directed to discriminations on account of race and color, and not to discriminations based upon such distinctions as had no reference to race or color, or perhaps to citizens

of the United States, not citizens of the State. This is clearly shown in the decision of the court in the Slaughter House Cases. 16 Wall. The Court say:

"An examination of the history of the causes which led to the adoption of the 13th, and 14th, Amendments, and of the amendments themselves, demonstrates that the main purpose of all the three last amendments, was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the white men who had formerly held them in slavery. In giving construction to any of these articles, it is necessary to keep this main purpose steadily in view."

At page 81 the Court say: "Nor shall any State deny to any person within its jurisdiction the equal protection of the laws.

"In the light of the history of these amendments, and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause."

"The existence of laws in the States where the newly emancipated negroes resided which discriminated with gross injustice and hardship against them as a class, was the evil to be remedied by this clause, and by it such laws are forbidden."

"If, however, the States did not conform their laws to its requirements, then, by the fifth section of the article of amendment, Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, *by denial of equal justice in its courts*, shall have claimed a decision at our hands."

In the Slaughter House cases it was attempted to extend the protection of the Fourteenth Amendment to discriminations made, or charged to have been made, between the citizens of the State, as such, upon other grounds than those of race, color, or previous condition of servitude. But the Court say that the ordinary fundamental rights of citizens, as citizens of the State, are alone under the protection of the State. Sovereignty, for this purpose, rests alone with the States. But

where some right pertains to a person as a citizen of the United States, making a distinction between a citizen of the State and a citizen of the United States—or where the rights of any *person* depends upon the Constitution and upon this amendment, then that right can be enforced and protected by appropriate legislation.

Justice Field, in his dissenting opinion, and as re-stated by him in Bartemeyer *vs.* Iowa, (18 Wall., 129,) thought that the protection of the Fourteenth Amendment extended much farther, and was designed to protect from partial discrimination in regard to, and from the abridgment of, those fundamental rights which belong to the citizens of all free governments, growing out of not only a jealousy and dislike towards the colored race, but towards citizens of the North settling in the Southern States, and towards those who had been loyal to the Government during the late rebellion.

But this view was not adopted by the Court, and the distinction was taken upon which we rely, and which it seems to me preserves to the full extent the sovereignty of the States, except in those cases in which they refuse to comply with the requirements of the Constitution and this Amendment, or permit a refusal to be made by persons charged with the execution of its laws, and it is in just such a case, and only such, that the power of the United States interposes and supplies the remedy for the failure of the citizen to enjoy the full protection of the right conferred or which is dependent upon the Constitution.

This doctrine is clearly stated in the case of United States *vs.* Reese, 92 U. S. At page 217, the Chief Justice says:

"Rights and immunities created by, or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, may provide. These may be varied to meet the necessities of the particular right to be protected."

The constitutional right conferred by the Fifteenth Amendment is, "exemption from *discrimination* in the exercise of the elective franchise on account of race, color, or previous condition of servitude.—This, under the express provisions of the second section of the amendment, may be enforced by appropriate legislation."

In this case it is implied that it would have been within the constitutional power of Congress to legislate for the protection of that right *even at State elections*, but the acts not being confined to such unlawful discriminations, though, perhaps, its general terms were broad enough to cover such a case, and being a penal act, it was held that Congress had not provided the appropriate legislation for such a case. The Court say, at page 218:

"It is only when the wrongful refusal at the State election is *because* of race, color, or previous condition of servitude, that Congress can interpose and provide for its punishment."

Again, in the United States *vs.* Cruikshank, 92 United States, at page 554, the court say:

"The Fourteenth Amendment prohibits a State from denying to any person within its jurisdiction, the equal protection of its laws, but this provision does not add anything to the rights which one citizen has under the Constitution, against another."

"The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States *do not deny this right. This the amendment guarantees*, but no more. The power of the government is limited to *the enforcement of this guaranty.*"

While, therefore, the duty of extending to all persons within the State, the *equal* protection of its laws, was originally assumed by the States and still remains there, yet, if it *does* deny or permit a denial of this *right of equality, of such inequality is based upon the ground of color or race*, then the power of the United States may enforce this guaranty of equality to the extent that it is denied.

Surely the doctrine we contend for with the limitations put upon it by the majority of the court, in the Slaughter House cases, is not so very dangerous or alarming as has been urged. There is nothing in this to so greatly excite the executive and legislative authorities of the State. This does not threaten to bring about the universal destruction of the sovereignty of the States, to establish the despotism of a centralized power upon their ruins, to result in the existence of the States at the mere will and pleasure of the United States, and to demolish and annihilate the independent autonomy of the States. This is not a surrender, of the whole police power of the State to the "arbitrary power and fanatical or partizan views of a Federal judge." No such fearful consequences need be apprehended. So far as our claim under this amendment is concerned, sovereignty for all purposes, except in regard to the *equal protection of the laws*, which the court says is a principle of every republican government, is fully preserved to the States. Let the State protect this right as all admit it is in duty bound to do, and there can be no interference whatever; if it does not, then the interference can be only so far as to *protect this right* by appropriate legislation. The sovereignty of the State for this purpose, and for

this alone, was under this clause surrendered to the General Govern- and however distasteful it may be, it is an obligation of the State assumed by it, and should be fulfilled with the most scrupulous regard to the dictates of honor and good faith, and all will be well.

If we have satisfactorily established the right of the citizen to a jury empanelled without discrimination against his race, the question is then presented by this case whether the remedy for the enforcement of such right in a criminal cause is provided for by Sec. 641, of the Revised Statutes.

This has been made a very serious question in several of the States and by some of them has been most strenuously denied.

The General Assembly of Virginia passed the following resolution in reference to the proceedings of Judge Rives of the District Court of the United States in relation to the removal of the trial of a criminal cause involving the same questions as arise in this case and such objection may be argued here:

"That the United States have only the right to prevent the exercise by the States of powers prohibited to them by the Constitution, by pronouncing such forbidden action void *through the judicial power*, but in no case can the United States undertake, in any manner, or for any reason whatsoever, to perform any duty which it is incumbent on a State to perform."

In the report of the joint committee it is elaborately argued that in such cases the power of the United States is only a power of negation, of judicial veto, (p. 15 of report.) This, it is argued, exhausts the power of the United States, and no positive enactment can be allowed to enforce the guarantees of the Constitution. It is claimed that there is "no power conferred upon the United States to perform a duty imposed on a State by the Constitution, for the State that neglects and refuses to do it herself," quoting for that purpose Kentucky *vs.* Dennison, (24 How., 107,) which was a case of mandamus upon the Governor to deliver up a fugitive from justice, and in no case can the United States exercise a coercive power upon the State or any of its departments, (p. 19,) and can only operate upon citizens within the limits of its reserved powers, and not on States, (p. 15,) that the power of enforcement is limited to the correction of erroneous decisions of the State courts, by writ of error or appeal.

To what an impotent condition does this reduce the General Gov-

ernment! The poor colored man has the right to take his case through all the courts, and finally to this Court! And this is the protection promised! There is no power of positive enforcement!

To show how this court has regarded the difference between having a cause tried as an original cause in the United States Court, or having it revised by a United States Court as an appellate tribunal simply, let me quote from Ch. J. Marshall, in the great case of Osborne *vs.* Bank of the United States, 9 Wh., at pp. 822–3. He says:

"If Congress did not have power to give original jurisdiction of the whole cause to the Courts of the Union, it could not be done on appeal, and words obviously intended to secure to those who claim rights under the Constitution, laws, or treaties of the United States, a trial in the Federal Courts will be restricted to *the insecure remedy of an appeal* upon an insulated point, *after it has received that shape which may be given to it by another tribunal, into which he is forced against his will.*"

Some such ground was taken by Virginia in the case of Martin *vs.* Hunter's lessee, (1 Wh.,) where the Court of Appeals declined to be bound by the mandate of this Court, and in which this whole doctrine was denied by this Court. At page 343 the Court say: It has been argued that the Constitution "was never designed to act upon State sovereignties, but only upon the people, and that if the power exists it will materially impair the sovereignty of the States and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent."

Let us see what has been the opinion of this Court in an analagous case:

Article 4, Section 5, subdi., 3, of the Constitution provides as follows:

"No person held to service or labor in one State under the laws thereof, escaping into another State, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

In Prigg *vs.* Pennsylvania, (16 Peters, 539,) legislation in enforce-

ment of this provision by Congress, was held to be not only valid, but that it made void all legislation by the State upon the subject, and that it was the exclusive province of Congress to legislate for its enforcement; and in Ableman *vs.* Booth, (21 How., 506,) the Fugitive Slave Law, having for its object the enforcement of this provision, was adjudged to be constitutional in all respects.

The object of this provision was to protect the interests of slavery and the slaveholder, and to show how, in a case involving the protection of these interests, this Court regarded such propositions as are argued here, let me quote from the syllabus in the case of Prigg *vs.* Pennsylvania:

"The clause in the Constitution of the United States, relating to fugitives from labor, manifestly contemplates the existence of a positive unqualified right on the part of the owner of the slave which no State law or regulation can in any way qualify, regulate, control, or restrain."

"It cannot well be doubted that the Constitution requires the delivery of the fugitive on the claim of the master; and the natural inference certainly is that the National Government is clothed with the appropriate authority and functions to enforce it. The fundamental principle applicable to all cases of this sort would seem to be, that where the end is required the means are given, and where the duty is enjoined the ability to perform it is contemplated to exist on the part of the functionaries to whom it is intrusted."

"The natural, if not the necessary conclusion, is, that the National Government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, executive, or judicial, as the case may require, to carry into effect all the rights and duties imposed by the Constitution."

I commend the study of this case to those who now, when a construction is sought in the interests of liberty and freedom, seek to deny the efficient power of the Government to enforce the guarantees expressed in the Fourteenth Amendment. I would ask those who deny this power to Congress to inform us what is meant by the words, "*Congress* shall have power to enforce," etc. What power of Congress is meant? It is the power of *legislation*. Surely some action is contemplated besides a "judicial veto." What is it?

See Op. of Clifford J., in the United States *vs.* Cruikshank, 92 U. S., at page 563.

Now, Congress is certainly entrusted with a duty, and with power to perform it. It is for Congress to say what means for the perform-

ance of this duty are necessary and proper. It is to judge of the necessity for the action they take.

McCulloch *vs.* Maryland, 4 Wheaton.
Knox *vs.* Lee, Wall., 457.

In the exercise of this judgment it has deemed it necessary and proper, in order to secure in part, at least, to persons the equal protection of the laws, to provide where such equal protection is denied by a State court, for a removal of the cause to the United States Court.

I believe that it is not seriously questioned but that this is a proper mode in civil cases, but the objection is strongly urged that it is an exceedingly improper mode in criminal causes. Let us consider the objections which are made to the law on this account.

The judicial *power* of the United States is, by the Constitution, extended to *all cases at law* or in equity, arising under the Constitution or the laws passed in pursuance thereof.

It is not simply to cases, but to *all* cases which in the case of Martin *vs.* Hunter, is referred to as showing a design "*ex industria*" that in this class of cases enumerated by the Constitution *all cases whatsoever* should be included.

This, of course, includes criminal cases, which are cases at law, where a Federal question arises In the case of Cohens *vs.* Virginia, 6th Wh., this Court expressly decided that the judicial power of the United States extended to a criminal cause when a State was a party, and took jurisdiction of it under its appellate powers, and asserted its power to reverse the action of the State court.

The judicial *power*, therefore, of the United States, even in a criminal cause in certain cases does therefore so far trench upon the sovereignty of a State, that it may seize hold of the controversy even after the State has fully considered the matter, and rendered its final judgment and may reverse and annul the deliberate and perfected action of the State court. This cannot be denied or controverted.

The question can arise then only as to the mode of exercising that power, and the right of Congress in the distribution of the judicial power to lodge it in an inferior court, to wit: The Circuit Court of the United States.

In some way or other, all cases involving a Federal question may be brought under the supervision of the Federal judicial power even though a State may be a party, and even though a suit may not be, and cannot be originally commenced in the Federal Court.

See U. S. *vs.* Ravara, 2 Dallas, 297.

Two modes of doing this have been exercised from the earliest period, one by *writ of error or appeal after* judgment, and one by *removal before judgment.* In Martin *vs.* Hunter, it was argued by Virginia that it was much more offensive to the sovereignty of the State to do this *after* the State had passed its judgment upon the matter, and that it could not be done after judgment *because* "Congress must have an unquestionable right to *remove* all cases within the scope of the judicial power from the State courts to the Courts of the United States, at any time before final judgment, though not after final judgment." (p. 346.) The answer to this was (p. 350,) "Precisely the same objections exist as to the right of removal before judgment, as after, and both must stand or fall together."

"The existence of this power of removal is familiar in courts acting according to the course of the common law in *criminal* as well as in civil cases, and it is exercised before as well as after judgment." (p. 349.)

"This remedy of removal of suits would be entirely inadequate to the purposes of the Constitution if it could act only on the parties, and not upon the State courts. In respect to *criminal prosecutions*, the difficulty seems admitted to be insurmountable; and in respect to civil suits there would in many cases be rights without corresponding remedies. If State courts should deny the constitutionality of the authority to remove suits from their cognizance, in what manner could they be compelled to relinquish the jurisdiction? In respect to *criminal cases* there would at once be an end of all control, and the State decisions would be paramount to the Constitution, and though in civil suits the Courts of the United States might act upon the parties, yet the State courts might act in the same way; and this conflict of jurisdiction would not only jeopardize private rights, but bring into imminent peril the public interests." (p. 350.)

It may not be quite so consonant with the dignity of the State sovereignty to appear before an inferior Federal Court as to appear before the Supreme Court, but there is no constitutional objection to its appearance before such inferior court, and surely it is a less interference to take jurisdiction of a cause before the State court has acted upon it than to assume that superiority over it, which is the attribute of an appellate tribunal.

At about the time of the decision of Martin *vs.* Hunter, was passed the act of 1815, in relation to revenue cases, which provided for the removal of *criminal cases* from State to Federal Circuit Courts.

This act, which grew out of the opposition of the New England States to the war with Great Britain, provided:—

"If any suit or *prosecution* be commenced in any State court against any collector, &c., under color of this act, * * * for anything done by virtue of this act, and the defendant shall, at the time of entering his appearance, file his petition, &c., [as in this case,] it shall then be the duty of the State court to proceed no further in the cause," &c. It then provides that the suit shall proceed in the United States Court, as if brought there by original process.

This was approved by President Madison, the author of the Virginia Resolutions of 1798 declaratory of State rights, and supported by the Democratic party, including John C. Calhoun.

Annals of Cong., 13th Cong., vol. 3, p. 1899.

The act of 1833 provided for the removal of any suit or *prosecution*. The Chairman of the Judiciary Committee, which introduced this bill of 1833, said:

"It gives the right to remove at any time before trial, but not after judgment has been given, and thus affects in no way the dignity of the State tribunals. *Whether in criminal or civil cases it gives this right of removal.* Has Congress power in criminal cases? He would answer the question in the affirmative. Congress had the power to give the right in criminal as well as in civil cases, because the second section of the third article of the Constitution speaks of all cases in law and equity, and these comprehensive terms cover all. * * * It was more necessary that this jurisdiction should be extended over criminal than over civil cases. If it were not admitted that the Federal Judiciary had jurisdiction of criminal cases, then was nullification ratified and sealed forever, for a State would have nothing more to do than to declare an act a felony or misdemeanor to nullify all the laws of the Union."

Thus has stood the law with this interpretation put upon it by the great men of those times, including, upon that committee, Webster, Frelinghuysen, Grundy, and Mangum—sustained by all except Mangum—by Benton, Clay, Forsythe, by the Senate almost unanimously, and by a large majority of the House, and not since questioned by any respectable statesman for nearly half a century. Laws recognizing this power have again and again been enacted by different Congresses, and have had the sanction of the most profound jurists from time to time, until they now exist in the form prescribed by the different sections of the Revised Statutes upon the subject.

In Mayor *vs.* Cooper, 6 Wall., this Court say: "Jurisdiction, original or appellate, alike comprehensive in either case, may be given.—

The constitutional boundary line of both is the same. Every variety and form of appellate jurisdiction within the sphere of the power extending as well to the courts of the States as to those of the nation is permitted. *There is no distinction between civil and criminal cases.*—Both are within its scope."

In Insurance Co. *vs.* Dunn, (19 Wall, 226,) the Court, after affirming in the strongest manner the validity of the acts of removal of causes from State to Federal Courts, "*where the least Federal ingredient is involved,*" without any restriction say: "The twelfth section of the act of 1879 and *the third section of the act of 3d March, 1833, relating to revenue officers*, present the same question. We are not aware that a doubt of the validity of *either* has ever been expressed by any Federal Court. The acquiescence is now universal."

The act of 1833 provides for the removal of criminal causes.

See also Vannevar *vs.* Bryant, 21 Wall., 41; Hodgson *vs.* Millard, 3 Grant, Pa., 416—Strong, J.; Com. *vs.* Artman, 3 Grant, Pa., 436—Grier, J.; Case of Madison J. Wells, Alb. Law Journal, Feby. 9, 1878, Bradley, J.; Story's Com. on the Constitution, sec. 1701; Federalist No. 82—approved by Story in above section; State *vs.* Hoskins, 77 North Carolina, 530.

In the case of Blyew *vs.* The United States, 13 Wall., 581, the United States Circuit Court took jurisdiction of a case of murder in Kentucky, of a colored person by a white person, on the ground that by the law of Kentucky, colored persons could not be witnesses against white persons, under the act of Congress of April 9, 1866, which gave to the Circuit Courts of the United States, jurisdiction of all cases, civil and criminal, *affecting* persons who are denied or cannot enforce in the State courts any of the rights secured to them by the first section of the act.

The court decided that a mere witness in a cause, was not a *party* "affected" by the denial of his right to give testimony. As to jurisdiction, the court, Strong J., say: "Was then the prosecution or indictment against these defenders a cause affecting any such persons? If it was, then by the provisions of the act, it was within the jurisdiction of the court, and if it was not, that court had no jurisdiction."

This, it will be observed, was a case in which the United States Court took *original* jurisdiction, an exercise of power far beyond that of removal from the State court. It is further to be observed in reference to this case:—

1st, That it was decided before the passage of the Fourteenth Amendment.

2nd. That a question who shall be a witness in a public prosecution

to which only the State and a white person as defendant are parties, is an entirely different one from the inquiry who shall be admitted to be jurors when a State is a prosecutor and a colored person defendant.

Is it not manifest that Congress in the exercise of its power to enforce the equal protection of the laws by appropriate legislation, has in adopting a remedy which has had the sanction of the government from the beginning of its judicial history, used those means which, consistent with any efficiency, are the least offensive possible to the dignity and sovereignty of the States? Could it have done less? To have held out to the class the Amendments were designed to protect the remedy only of appeal to the Supreme Court of the United States, from the final judgment of the State, would have been simple mockery, an evasion of the obligations of the Amendments, and a practical abandonment of the colored race to the tender mercies of their former owners, under just such laws as this court has said led to the adoption of the last three Amendments, for if the remedy of removal is denied in this instance upon the ground that it is unconstitutional to remove a criminal cause, the remedy must be denied to all criminal causes which can arise under the Amendments, or any laws passed in pursuance thereof.

It is all along to be borne in mind, that we claim no right of general supervision over the criminal law of the State. It is only when a Federal ingredient is involved, and for the purposes of this case only when the equal protection of the laws is denied by the State.

This Court has laid down a much broader field of Federal jurisdiction than it is necessary for us to invoke. It has held that Congress may confer jurisdiction upon the United States Courts, where the least Federal ingredient is involved. Mayor *vs.* Cooper, 6 Wall, 252.

If, however, this court is not of the opinion that the Circuit Court of the State committed an error in denying the right of the accused to have his cause removed to the Circuit Court of the United States, yet it has before it the questions involved in the remaining assignments of error.

There is drawn in question by them the validity of a statute of the State on the ground of its being repugnant to the Constitution and the decision was in favor of its validity, and there was a right and privilege and immunity claimed under the Constitution and under the

statutes of the United States, and the decision was against such right, privilege, and immunity, as set forth by Sec. 709 of the Revised Statutes of the United States.

The right to have a jury empannelled without discrimination against the race and color of the accused was insisted upon in every possible form; by motion to quash the *venire facias* by challenge to the array, motion for a new trial, and motion in arrest of judgment, each time specifically denying the validity of the statute restricting juries to white men and insisting upon the aforesaid right under the Constitution of the United States, and these errors were specifically assigned in the petition for writ of error to the Supreme Court of Appeals of the State.

There can be no question as to the right and duty of this court to pass upon the right of the accused to such a jury as he demanded. Jurisdiction to pass upon such a question is not only plainly given by Sec. 709, of the Revised Statutes, but is affirmed by the case of Cohen *vs.* Virginia, 6 Wheaton.

But our claim is that a state of facts arose which put an end to the jurisdiction of the State court, and gave the accused the right to have his trial in the Federal Court, that all the proceedings in the State courts, subsequent to the filing of the petition, were absolutely "*coram non judice*," and that the only remedy the State now has, if any, is to prosecute the accused in the Circuit Court of the United States, as the statute providing for a removal prescribes.

CHARLES DEVENS,
W. WILLOUGHBY,
Of Counsel for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 753.

TAYLOR STRAUDER,

PLAINTIFF IN ERROR,

VS.

THE STATE OF WEST VIRGINIA,

DEFENDANT IN ERROR.

Brief for the Defendant in Error

BY

JAMES W. GREEN.

Supreme Court of the United States.

IN THE

Supreme Court of the United States.

No. 753.

TAYLOR STRAUDER, plaintiff in error,
vs.
THE STATE OF WEST VIRGINIA,
Defendant in Error.

Brief for the defendant in error by James W. Green.

The briefs, filed by the counsel for the plaintiff in error and by the Attorney-General of the State of West Virginia, contain a full statement of the case and render any further statement unnecessary.

Conceding, for argument sake, that the statutes of the State of West Virginia, not only exempt all negroes from service on juries (grand and petit) but exclude them; also, that the plaintiff in error brought himself within the terms of the act of Congress providing for the removal of causes from the State Courts to the Circuit Courts of the United States; and further, that Congress has done all in its power to provide for the removal of such a case, as the case at bar, we will confine ourselves to the question, whether Congress has the power, under the Constitution of the United States, or of any of the amendments thereto, to provide for the removal of the trial of a negro charged with the murder of his wife, also a negro, from a State Court to the Circuit Court of the United States, for the reason that by the Statutes of the State all negroes are excluded from serving either on its grand or petit juries.

It is conceded on all sides that the Federal Government is one of limited powers, that "the powers not delegated to the United

States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people," and, by consequence, whenever it is claimed that a statute of a State is in conflict with any provision of the Constitution of the United States, the burden of proof is on the party holding the affirmative. If, after full argument and mature consideration by the Court, a serious doubt remains, the party holding the affirmative has failed.

It is not claimed that there is anything in the original Constitution of the United States, or in the amendments thereto, prior to the 13th, prohibiting a State, by statute, from excluding negroes from serving on juries.

If a State is prohibited from passing such a statute the inhibition must, therefore, be found either in the 13th, 14th, or 15th amendments, or in them all combined. The burden of establishing such inhibition lies, and lies heavily, on the other side; it is not incumbent upon us to establish the negative: but, as in this case, it is in our power to do so by a course of reasoning without defect or fault, we will.

In mathematical demonstrations the process of reasoning is usually direct, from step to step, until the truth of the proposition to be established, is proved: but often the indirect mode, termed *reductio ad absurdum*, is resorted to. This mode of reasoning proceeds thus. First, it is shown that the one or the other of two propositions must be true; then by a course of reasoning in which there is no defect or fault, that the alternative proposition would lead to an absurdity. Thus, by the process of *reductio ad absurdum*, the truth of the proposition, to be established, is proved. Often the truth of a mathematical proposition can be proved *only* by the process of *reductio ad absurdum*. So in the case at bar, it may be, the truth of the negative proposition maintained by us can only be proved by this process. It can be proved in this way, as we will proceed to do.

By the 13th amendment it is provided "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."

It is claimed that to exclude negroes from serving on juries

is to put them in a state of involuntary servitude. If this be true, then to put any other people, distinctly marked as a class, such as women, infants (it may be, a day old only,) unnaturalized Chinese and other foreigners in the same category, would be to reduce them to the same condition. This would lead to the result (absurd) that all such laws (which not only one, but every State in the Union have enacted) are unconstitutional because thereby all such persons are reduced to a state of "involuntary servitude."

By the 14th amendment it is provided that, "all persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is claimed that the right to serve on juries is a privilege or immunity belonging to every citizen of the United States, and for any State by its laws to exclude negroes from serving on juries is to abridge a privilege or immunity appertaining to citizenship. If this be true, then to exclude any other citizen from serving on juries is equally to abridge his privilege or immunity, and all the State laws excluding women, infants, naturalized Chinese and other foreigners are unconstitutional, because all such persons are citizens. Such claim cannot be true, because the result to which it leads is absurd.

Senator Morgan, in a speech delivered last June in the Senate of the United States, took the ground that service on juries was an essential right of citizenship, but the contrary has been established. Moreover, he did not seem to remember that the Congress of the United States had some years before, passed an act, excluding from juries in the Federal Courts, all citizens who could not take what was termed the "iron-clad oath," and its right to do so had never been questioned by any court.

By the 14th amendment it is further provided that no State shall "deny *to any person* [be he citizen or not] within its jurisdiction the equal protection of the laws."

It is claimed that a State which excludes negroes from serving on juries, thereby denies to them the equal protection of the laws. If this be true, then the proposition is again reduced to the same

conclusion, that a State which by its laws excludes from its juries women, infants, and unnaturalized foreigners, thereby denies all such persons the equal protection of the laws; for they, as persons within the jurisdiction of the State, are as much entitled to the equal protection of the laws as native born citizens. Such claim cannot be true, because the result to which it leads is absurd.

It is further claimed that, although to exclude negroes from serving on juries, be not a denial of the equal protection of the laws to the negroes thus excluded, yet to subject a negro to trial by a jury from which, by statute, all his race are excluded, is to deny to such prisoner the equal protection of the laws. If this be true, then to subject to trial by a jury any minor, woman, or unnaturalized foreigner, from which all of their class or race are excluded, would be to deny to all such persons the equal protection of the laws—an absurd result. It is not pretended that the 15th amendment prohibits any discrimination "on account of race, color, or previous condition of servitude" except in respect to the right of voting. On the principle of *expressio unius, exclusio alterius,* this admits that such right of discrmination exists in other respects, unless inhibited by some other article or provision of the Constitution of the United States. Here we might rest our case, having proved, we respectfully submit, by the process of reasoning, without defect or fault, termed *reductio ad absurdum,* that the pretentions of the other side cannot be true. But we will not stop here; we will endeavor to clear up the confusion and perplexity with which, it is admitted, the other side have surrounded the subject, although more is required of those who hold the affirmative than to confuse and perplex.

The guarantee of the equal protection of the laws does not carry with it the equal *participation* in their *administration.* If it did, infants, women and unnaturalized foreigners would be entitled to an equal participation in their administration, and could not be excluded from serving on juries or be tried by juries from which all of their class or race were excluded. The substantial claim of the other side is not that the criminal statutes or laws of West Virginia subject the negro to any greater punishment than the white man, but that the negro is denied an equal *participation* in their *administrntion;* we answer, so are women, in-

fants and unnaturalized foreigners; and yet it cannot be pretended for this reason that they are denied the equal protection of the laws.

We rely on the judgment of the Court in the Slaughter House cases, delivered by Justice Miller, 16 Wall., 36; but we do not wish to be understood as supposing, for a moment, the opinions of the dissenting Justices militate against our position in the case at bar; we confess our own judgment is with them. In that case it was not a denial of equal *participation* in the *administration* of a law, operating equally on all persons, that was complained of, but the denial of the equal protection of the laws, on the face of the statute creating the monopoly, whereby all other people were denied the right to engage in a lawful pursuit to earn a livelihood, except on condition of paying tribute to the corporators. Had the Court rendered judgment according to the opinion of the dissenting Justices, it is true it would ultimately have resulted in as widespread a social revolution, as the emancipation of the African race produced in the States where the institution of slavery formerly existed. The laws of all the States, from Maine to California, from the great lakes of the North to the Gulf of Mexico, creating private corporations, with the exclusive privilege to the corporators of not being individually responsible for the debts of the corporation, and having for their object the conducting of various kinds of business, in which every man has the right to engage, are a denial of the equal protection of the laws to all other persons, by depriving them of the right to engage in such business on terms of equality in competition with the corporators. Their effect is to close well-nigh all the avenues of business to the great mass of the people, to compel them to become the employees of these private corporations—to reduce them to the condition of serfdom. The injustice, wrong and oppression produced by these laws, has given rise to the organized bodies, known as Communists, Internationalists, Molly Maguires, &c. &c. We know that it is claimed such laws are for the public good, but this is but a pretext—always the pretext of the monopolist. We have a standing monument of proof here, in the city of Washington, that it is all a pretext. The old Banking House of Corcoran & Riggs, now Riggs & Co., has grown up, not under the fostering care of the Government

conferring exclusive privileges on them, but on the personal merit and responsibility of its members; when all, or well-nigh all, of the chartered banks throughout the country succumbed a few years ago and suspended payment, the house of Riggs & Co. stood firm, and its deposits were greatly increased by withdrawals from their incorporated competitors. So in Europe, the great banking-houses of the Rothschilds have not grown up under the fostering care of the different governments, but in spite of them.

Corporations for public improvements such as railways, &c., stand on a different footing, as was said by the dissenting Justices in the Slaughter House cases, because no individual in order to make them has a right to condemn the lands of others. It requires the exercise of the right of eminent domain belonging to the State exclusively. The State however should always retain such control over corporations chartered for such purposes, as effectually to prevent the powers, granted to them for the public good, from being perverted to the detriment of the public interest, or the oppression of individuals.

We rely also on the judgment of the Court in Bradwell vs. The State, 16 Wall. 130, in which the Court held a State could exclude all women from practicing law. In addition to the reasons given by the Court for its judgment in that case, it may be added, that all statutes and rules of court, concerning the profession of the law and who shall be admitted to its practice, pertain to the administration of the laws: it is not a denial of their equal protection to all persons, for those only to be admitted to this participation in their administration, whom the State shall judge fit and calculated to aid the courts in upholding the truth and dispensing justice equally to all, in accordance with the laws.

Other grounds, on which we rely, will be found stated in the brief, filed by Attorney General White, and in the opinion of Judge Green, who delivered the unanimous judgment of the Supreme Court of Appeals of the State of West Virginia, appended to the brief of Attorney General White.

Whatever may be thought of the statesmanship, the justice or expediency of such a statute, as the one in question, it is not in conflict with any provision of the Constitution of the United

States, or any amendment thereto. It is for the State of West Virginia, alone, to determine by what kind of machinery her courts shall be aided in the administration of her laws. If she chooses, she may abolish altogether the trial by jury, for it is not guarantied by the Constitution of the United States, except in the Federal Courts.

JAMES W. GREEN,
Of Counsel for the State of West Virginia.

October 21*st*, 1879.

Supreme Court of the United States.

TAYLOR STRAUDER, Plaintiff in Error,

vs.

THE STATE OF WEST VIRGINIA, Defendant in Error.

Robert White,
Attorney-General of West Virginia.

Judd & Detweiler, Printers.

Supreme Court of the United States.

TAYLOR STRAUDER, Plaintiff in Error,

vs.

THE STATE OF WEST VIRGINIA, Defendant in Error.

Taylor Strauder, a negro, was tried and convicted in the circuit court of Ohio county, West Virginia, for the murder of his wife, Annie Strauder, a negress.

After the first conviction a new trial was granted by the court of appeals of that State, for reasons not necessary here to be referred to.

Upon the second trial, the prisoner asked that the case might be removed to the circuit court of the United States, there to be tried for the reasons set forth in his petition, which may be found embraced in his bill of exceptions number two, upon the sixth page of the printed record. His prayer in that behalf was refused.

By an examination of the other bills of exceptions in the record it will be seen that the prisoner also claimed that the acts of the West Virginia Legislature, which imposed jury service in the courts of that State upon the white citizens of the State, is repugnant to the Constitution of the United States.

The act of the Legislature referred to may be found in the acts of 1872–3, chapter 47. The first section of which is in these words:

"1. All white male citizens who are twenty-one years of age, and not over sixty, and who are citizens of this

State, shall be liable to serve as jurors, except as hereinafter provided."

The second section then proceeds to exempt various persons therein enumerated from serving on the juries.

After his conviction a second time, he obtained a writ of error to the supreme court of appeals of the State of West Virginia, which court, after a mature consideration of all the questions involved, affirmed the judgment of the circuit court of Ohio county, and from that action of the said court of appeals, the prisoner obtained a writ of error to this Court.

The Revised Statutes of the United States, section 641, under title 13, chapter 7, (see R. Statutes of U. S., p. 114,) provide, among other things, "when any criminal prosecution is commenced in any State court against any person who is denied, or cannot enforce, in the judicial tribunals of the State, or in that part of the State where such prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, such prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial, stating the facts, and verified upon oath, be removed for trial in the next circuit court to be held in the district where it is pending." And section 1977 of the Revised Statutes of the United States, under 24th title 'Civil Rights,' p. 348, provides: "All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and executions of every kind, and to no other."

The authority of the Congress of the United States to pass these acts is claimed under the thirteenth, and a portion of

the fourteenth, amendments of the Constitution of the United States, which are in these words: "Neither slavery nor involuntary servitude, except as a punishment for crime, whereof the party has been duly convicted, shall exist within the United States at any place subject to their jurisdiction." And "all persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." And under a general provision applying to both the fifteenth and fourteenth amendments, "Congress shall have power to enforce the provisions of this article by appropriate legislation."

The opinion of *Green*, President of the Supreme Court of West Virginia, rendered in this case, is full and able. In order that the Court may have ready access to it, I append hereto the greater part of it in relation to the question before the Court.

I deem it unnecessary to attempt to enlarge, by way of argument, upon what Judge Green has said, but will add a few suggestions which have occurred to me as pertinent.

The Civil Rights Bill referred to, it is seen, provides that all persons shall have the same *right* to make contracts, &c., and to the full enjoyment and *equal* benefit of all laws, &c. The said 641st section of the judiciary act provides for the removal from the State courts of cases of such persons as are *denied* or *cannot enforce* in the State courts any *right* secured to them by *any law* providing for the *equal* civil rights *of citizens of the United States.*

Where, then, is there *any act or law* providing for the civil rights of citizens of the United States which gives them the *right of trial* by a jury of their own color, or of

their own sex, or of persons of a certain age, or of any peculiar condition or qualification? The only *right* of trial by jury *belonging to citizens of the United States* indicted for crime *is that* right provided for in the *sixth* article of the Constitution of the United States, which says, that "in all criminal prosecutions the accused shall enjoy the right of a speedy and public trial by an impartial jury *of the State* and district wherein the crime shall have been committed," &c.

Has this *right* been *denied* to the prisoner? Has he not been tried by a *jury of the State*, wherein the crime was committed?

This Court, in the case of State *vs.* Bardwell, 16 Wall., 130, in construing the clause: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," says, "the protection designed by that clause, as has been repeatedly held, has no application to a citizen of the State whose laws are complained of.

And in that case, the Court goes so far as to hold that there are certain *privileges and immunities* that belong to a citizen of the State, *as such*, which do not depend on citizenship of the United States, which the State is not forbidden to abridge; as in *that* case the right to practice the profession of law in the State courts.

The law here violated *is a State law;* the prisoner a *citizen* of the State; the jury was a jury of the State, formed under its laws. As is seen in the *Bardwell case*, *it is the laws of the State of which he is u citizen that* he complains of; and the said clause of the Constitution upon which he relies has (see *Bardwell's case* aforesaid) no application to his case.

Article 10 of the Amendments to the Constitution of the United States provides that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The amendments to the Constitution do not anywhere

delegate to Congress the power to prescribe the qualifications of jurors in the courts of the States, and certainly the power of the State to prescribe such qualifications is nowhere prohibited, limited, or in any manner abridged.

Is it not true that the State can still discriminate in the selection of *its* jurors? That right clearly existed in the State prior to the adoption of the 14th amendment. Was it given up by the adoption of that amendment?

Chief Justice Waite, in the case of The United States *vs.* Rees *et al*, 92 U. S. Rep., on page 217, in speaking of the effect of the 15th amendment, says:

"The fifteenth amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another, on account of race, color, or previous condition of servitude. *Before its adoption this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, &c., as it was on account of age, property, or education.* * * * * *Previous to this amendment there was no constitutional guaranty against this discrimination.*"

If this was true with reference to the voter prior to the adoption of the 15th amendment, I ask where is the amendment of the Constitution by which the State has given up its power to discriminate as to its jurors?

Where, then, is there "*any law*, providing for the *equal civil rights of citizens* of the United States, which has been violated by the Court below? Where has any *right*, secured by any *such law*, been *denied* to the prisoner?

In the case of United States *vs.* Rhodes, &c., 1 Am. L. T. R., 22, (1868,) referred to by Judge Green, the Court says, on page 24, "It will be observed that jurisdiction is given to this court of all causes, civil and criminal, affecting persons who are denied, or cannot enforce, in the local State courts, any of the *rights* secured by the first section of this

act;" and, on page 32, the court says, that the act "gives only certain civil rights;" and it is held that the right to "*give evidence*," is a *right conferred by the law* upon colored as well as white citizens of the United States, to be enjoyed by all alike, or *equally;* and that this *right*, being thus conferred by the Constitution and laws of the United States upon all the citizens of the United States, colored and white alike, cannot be denied or abridged in a *local State* court, or by local State laws; but even that case does not pretend to hold that the *rights* of a white person conferred upon him by *the State as a citizen of the State*, must necessarily likewise be conferred by the State upon negro citizens of the United States residing in such State.

It will be observed by the Court that the act of Congress of March 3, 1875, 18 Statutes at Large, page 335, was not enacted until after the trial of the plaintiff in error by the circuit court of Ohio county.

It is the *right of trial by jury* that is conferred by the Constitution of the United States, but nowhere the right to have the jury composed of any class, condition, or color.

If it is true, as is claimed by plaintiff in error, that the right exists, by virtue of the amendments, to have a jury of a particular class, condition, or color, then it must follow, as a necessary sequence, that service upon a jury is a *right.*

Trial by jury is a right; a right, too, secured by the Constitution, but service as a juror has ever been considered as *a duty imposed by law* upon the citizen.

Blackstone, in his 3d book, ch. 23, upon the subject of "trial by jury," clearly shows that this was true in the old English law, and points out the *qualifications* fixed by law at various times.

Lord Coke, too, speaks of these *necessary qualifications.* (See 3d Thomas Coke's Lit., ch. 11, p. 365.)

Following down the laws, even to this day, can it anywhere be found that such service has ever been treated as a

a right, inherent or constitutional, of the citizen? Has it not always been considered as a *duty imposed* by law?

Did the law in the Code of Virginia of 1819 abridge the right of trial by jury when it provided a *property* qualification for a juror?

Our jury law confers no *right* upon the *citizen* of the State to act as jurors; but by its very terms, it only imposes a duty—a *service*—upon "all white male persons who are twenty-one years of age and *not over sixty*, and who are citizens of this State," by making them (with certain exceptions) "*liable* to service as jurors;" and it not only imposes that duty, but when that service and duty is performed *it is paid for.*

What abridgment of *right* is there in this law which only imposes an onerous service upon the white man?

The right to hold office is a right conferred upon every citizen; so is the right of *trial* by jury; but by no law, constitutional, statute, or common, is there a right to *do service as a juror* conferred.

Again, the "Civil Rights Law" only professes to give to all persons the equal benefit of all laws and proceedings for the security of person and property "as is *enjoyed by white citizens.*" Had not the prisoner the same benefits under the law that any white citizen could enjoy?

Counsel complain that the law requires a negro to select a jury of white men. That same law requires a white man, no matter what his age, to select as jurors men between the ages of twenty-one and sixty years; and, could complaint be made, the law declared unconstitutional, and a verdict set aside because a white man of seventy years of age was compelled to be tried by jurors under sixty years old?

A woman is a citizen. Can she complain if not tried by women? A child is a citizen. Can a child complain because not tried by children? A negro is a citizen. Can he then complain because not tried by negroes? Under

our law the negro gets all the *rights* a white man has, can he ask for more?

Again, even if there is no reasonable doubt as to the unconstitutionality of the jury law of the State of West Virginia, it is submitted that the prisoner, by his petition, (which may be found on page six of the printed record,) did not present such a state of facts as would entitle him to have his case removed into the United States court under the provisions of said section 641 of the Revised Statutes.

That law provides that a case *may* be removed upon the petition of the defendant filed in the State court, "*stating the facts*, and verified by oath."

What, then, must the petition show? Why, clearly *facts* which *show a case* in which the defendant is denied or cannot enforce the full and *equal* benefit to him, as a citizen of the United States, in the circuit court of Ohio county, of some "right *secured to him by a law providing for the equal* civil rights of citizens of the United States."

It is shown before, we think, that this he has not done and cannot do in this case.

But what does his petition show? Why, only that he (as well as his wife, whom he slew) is a person of color, formerly a slave, emancipated years ago; and that no colored man can serve as a juror in West Virginia.

It avers that in time of slavery the relation of husband and wife was not recognized between slaves in West Virginia, but does not aver that that relation was not recognized both by the law and by the citizens, in 1874; the fact is that then it was recognized both by the law and public sentiment in Ohio county.

It avers, it is true, but in nowise shows, that colored men are not entitled to protection in their marital rights. It fails to state facts which show that here colored men are not entitled to protection in their marital rights, or how or why, his defense depended upon such facts, if shown; or how or why, if shown, he is denied the benefit of them; or

how or why they, if shown, are such as are "secured to him by a law providing for the equal civil rights of citizens of the United States?" Indeed, the marriage relation and marriage laws of a State are entirely subject to the State control, and in nowise affected by the Civil Rights Law. (See State *vs.* Gibson, 10 Am. R., 42.)

It fails to show how the service of white men upon the jury affects his enjoyment of any rights conferred by the 14th amendment or the Civil Rights bill. He avers that he *believes* he cannot have full and equal benefit—not of the laws mentioned in said acts of Congress—but of the laws of West Virginia, for the security of his person, such as are enjoyed by white persons, but fails to give *any facts*, which show that he is denied the equal benefit, as a citizen of the United States, of any right secured to him by a law providing for the equal *civil rights* of citizens of the United States?

If sufficient *facts* are not shown, the petition does not conform to the requirements of the statute.

Simply because he is a negro does not make out his case.

Simply because he is a negro and slew a negress, his wife, does not make out a case.

The case of The State *vs.* Dunlap, 4 Am. Law Times Reports, p. 205, upon which counsel rely, decided in North Carolina, in 1871, a case which has never been reviewed and never sustained, so far as I can learn—even that case does not hold any such doctrine as the defendant asks this Court to hold.

In that case the court clearly says that the object of the act of Congress was not merely to prevent discrimination by the laws of the State, for the judge there says: "Had the object been merely to prevent discrimination by the laws of the State, very few words would have answered the purpose, and there would have been no occasion for an affidavit in regard to matters which must appear on the face of the public law;" and, he says distinctly, that "it does not extend to and attempt to control or regulate the preju-

though he might be a freeman, was not and could not be a citizen. This decision, though disapproved by many lawyers, had never been overruled. By this decision the whole negro race were not only not citizens, but were incapable of becoming so, except by an amendment of the Constitution of the United States. To remove this difficulty was the object of the first clause above quoted; and it was obviously the principle, if not the whole object of the entire first section of the fourteenth amendment of the Constitution of the United States; the other clauses, as we shall presently see, were principally intended to insure the carrying out of this first clause to its full extent; and if they add anything to its force or scope, such addition is very small and practically amounts to nothing. It is true that Judge Swayne, in the case of the United States *vs.* Rhodes, decided, in February, 1868, by the circuit court of the United States for the district of Kentucky, and reported in the American Law Times Reports, vol. 1, p. 23, had decided that all persons born in the United States and subject to their jurisdiction were citizens; and Congress had, by the act of April 6, 1866, so expressly declared. But as this act of Congress and decision of the circuit court of Kentucky were in direct opposition to the decision of the Supreme Court of the United States in the Dred Scott Case, it was wisely considered that neither this act of Congress, nor this decision of Judge Swayne would ever be acquiesced in as setting aside a solemn and well-considered decision of the Supreme Court of the United States. And, hence, the passage of the fourteenth amendment of the Constitution of the United States. The next clause of this amendment is: 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.' This was really no new provision in the Constitution of the United States. A provision was already in the Constitution which, in effect, and almost in words, corresponded with this clause. The first clause in the scond section of article four of the Con-

stitution provides: 'The citizens of each State shall be entitled to all the privileges and immunities of citizens of the several States.' It is obvious, on inspection, that the only change made by the second clause is to insert, instead of 'citizens of the several States,' in the fourth article the words 'citizens of the United States.' The object in making this change of phraseology is obvious. It was not thereby intended to confer on anybody any new rights, privileges, or immunities. It had been said by eminent judges that no man was a citizen of the United States unless he were a citizen of one of the States of the Union. Those, therefore, who had been born and resided always in the District of Columbia, or in the Territories, though within the United States, were not citizens. Whether this proposition was sound or not had never been judicially decided by the Supreme Court of the United States. A great controversy had been carried on by statesmen as to the character of the Government of the United States, and whether any allegiance was due from the people directly to the United States, or whether their allegiance was due only to the States severally. In view of these difficulties, it seems highly probable that this change of words (the substituting of 'citizens of the United States' for 'citizens of the several States') was made to have its effect on these mooted questions. It is unnecessary to determine what effect of this character they may have. Its effect, if any of this sort, is a political effect, and a case can hardly arise in which it can become proper for the courts to express an opinion upon its effect in this respect. We can, however, with great confidence say this change of phraseology can have no effect whatever on the rights, immunities, or privileges of any person whatever. The first clause of the second section of article four of the Constitution expressly confers on the citizens of each State all the privileges and immunities of citizens of the several States. And this is all the effect of this provision of the first section of the fourteenth amendment, so far as it operates on the immunities

and privileges belonging to any person. By denying to States the right to abridge the immunities of the 'citizens of the United States,' was evidently meant the denying to the States the right to abridge the immunities of persons having permanent residences in other States, or in the Territories, as distinguished from citizens of the State. The rights of a State over its own citizens were not intended to be changed by this amendment of the Constitution; and a State may now deny to any of its own citizens, any rights and immunities whatever, excepting only such as are protected from violation by express provision in the Constitution of the United States. These rights and immunities thus protected are but few, and are specifically enumerated; as, for instance, the right to have one's contract enforced, which is protected by the provision that no State shall impair the obligation of contracts. It is true that the Congress of the United States, in the passage of the Civil Rights act, before quoted, evidently assumed that this 14th amendment had conferred on the United States powers far beyond those, which this interpretation would confer; and that the States were, by this 14th amendment, restricted to a great extent in their power of denying to their own citizens' rights and immunities, which had theretofore been considered under the control and protection of the State governments. It is also true that certain of the judges of the circuit courts of the United States under unfavorable surroundings, and at times when their judgment was warped by the general condition of the country, have given to this Constitutional amendment, and especially this clause, a far wider scope than I have indicated. But the Supreme Court of the United States has disapproved of such broad construction of this amendment, and has, with constantly increasing clearness, declared these constructions, whether made by the circuit judge, State courts, or Congress, were unjustifiable. Their most recent decisions approximate closely to the views I have above expressed. A few exam-

ples of these perverted views of this amendment, repudiated by the Supreme Court of the United States, will be cited. Thus in the case of The State *vs.* Dunlap, decided by the supreme court of North Carolina, in June, 1871, reported in the American Law Times Reports, vol. 4, p. 205, it was held that 'an affidavit by a colored man in a criminal case pending in a State court, setting forth in substance, that by reason of his color and previous condition of servitude, he could not obtain justice in the courts of his State, entitled him to have his case removed into the United States circuit court.' In examining this case, it will be observed that the colored man was indicted for murdering a white man, as his petition set forth; he also stated in it that at the time of the alleged homicide, a systematic effort was made by divers persons, members of the Democratic party, to produce the impression that the murdered man was killed by the prisoner, and that in killing him he was actuated by political motives; that the officials by whom the jury would be formed were all democrats; that a colored man was seldom on the jury, which would be composed almost entirely of democrats; and under the circumstances he could not obtain justice in the State courts. It is obvious that the circumstances surrounding this case were exceedingly unfavorable for obtaining a fair and impartial construction of the constitution or law; and it is, therefore, not surprising that Chief Justice Pearson decided as he did.

"But we had a right to expect him, in rendering such a decision, to make some sort of reference to the Constitution of the United States, and not content himself, as he did, with construing the third section of the act of Congress of April 9, 1866, which confers exclusive jurisdiction upon the courts of the United States in all cases, civil and criminal, affecting persons who are denied or *cannot enforce* in the State courts, any of the rights secured by the first section of that act, among which is the full and equal benefit of all

laws and proceedings for the security of persons and property. Had he examined it, he would have found that the Constitution not only did not authorize the Congress to permit the interference of the Federal courts, because the laws of a State would not be fairly enforced against citizens of the State, because of prejudice, but equally forbade such interferenee, when the State laws on their face made discriminations against certain of its own citizens; and permitted such interference only when the State laws on their face improperly discriminated against residents of other States, even though they might be sojourning in the State. Such a decision as was rendered by Judge Pearson may be apologized for by referring to the times in which it was rendered, but can never be justified, much less followed. So, too, in the case of United States *vs.* Rhodes *et al.*, decided by the circuit court of the United States, for the district of Kentucky, in February, 1868, reported in the American Law Times Reports, vol. 1, p. 23, Judge Swayne decided that the Civil Rights Law of April 6, 1866, was agreeable to the 13th Amendment of the Constitution of the United States abolishing slavery, and empowering Congress to enforce the same by appropriate legislation; and that Congress had rightfully thereunder given to colored persons the same right to testify, as is enjoyed by white citizens, and had also given to the courts of the United States jurisdiction of all causes, civil and criminal, which concern the colored man, whenever the right to testify equally with white men is denied him. The judge in this decision did not, like Judge Pearson, omit to take notice of the Constitution of the United States. To reach his conclusions, as the 14th amendment of the Constitution had not passed, he had first to overrule the decision of the Supreme Court of the United States in the *Dred Scott Case;* he then had to decide that the words "civil and criminal causes" in the Civil Rights Act did not mean "civil and criminal cases," but causes or matters, out of which cases

arose. This construction was necessary, or otherwise he would have had likewise to have overruled the decision of the Supreme Court in the United States *vs.* Ortigu, 11 Wheat., 467; but this nice distinction is overruled by the Supreme Court of the United States, in the case of Blyew *vs.* United States, 13 Wal., 581; and the decision of Judge Swayne, in the United States *vs.* Rhodes, which was cited in that case, was expressly overruled; the entire Court concurring in this conclusion, excepting only Bradley and Swayne who dissented. It is difficult to conceive how the amendment abolishing the institution of slavery could possibly have been considered as restricting the rights of the States over any freeman.

"It left, of course, the rights of freemen exactly where they formerly were, and only declared that all persons should have these rights; but the power of the State and the Federal Government over the rights of freemen were not, and could not be affected by the 13th amendment; yet it was held in this case, that this 13th amendment authorized Congress to pass a law, in effect nullifying a law of Kentucky, whereby colored men could not testify against white persons. Such laws existed in many States; and no one had ever questioned the right of the Legislatures to pass them. The Constitution of the United States had in no way prohibited such legislation by the States, and all had admitted the right of the States to legislate on this subject as they chose. The 13th amendment conferred no rights on any freeman, and could not therefore possibly affect the rights of the State to legislate on this subject. And the act of Congress, so far as it interfered with the acknowledged right of the States, was unconstitutional and void. But Judge Swayne held otherwise. He held that the simple abolition of slavery by the Constitution conferred on Congress the right to treat as nullities the laws of the States passed with reference to freemen. If Judge Swayne was right, it was worse than useless to pass the 1st section of the

14th amendment of the Constitution of the United States; for Congress already had all the powers and greater powers than are conferred on it by this section. Even since the passage of the 14th amendment, it has been decided that a State has a right to exclude from testifying in its courts, any class of its inhabitants or citizens that it chooses. Thus in California, by statute, Chinese are not permitted to testify for or against white persons; and the Supreme Court of California has decided that this law is not in violation of the 14th amendment of the Constitution of the United State. (See People *vs.* Brady, 40 Cal. R., p. 198.)

"In Hobbs' case, decided September 1870, in the District Court of the United States, for the northern district of Georgia, reported in the American Law Times R., vol. 4, p. 190, Judge Erskin held, that a State law prohibiting marriage was not repugnant to the Civil Rights Bill, marriage not being a contract within the meaning of the Civil Rights act, and he held further, that such a law was not in conflict with the 14th amendment of the Constitution of the United States, though he gave a much more comprehensive meaning to that amendment than is given by some of the State courts and by the Supreme Court of the United States. Thus, in delivering the opinion in that case, he says that the first clause of the 2d section of article 4 of the Constitution of the United States applies to citizens removing from one State to another; while he seems to think that language, which we have seen is in substance the same, and almost in the same words, when used in the 14th amendment has a much broader meaning and includes permanent residents of the State as well as citizens of other States. This view however has been repudiated, not only by the Supreme Court, but by the State courts. Thus the same decision, in reference to the constitutionality of a State law prohibiting marriage between white persons and negroes, was made by the Supreme Court of Indiana, in The State *vs.* Gibson, 36

Black R., 389, decided in 1871. But this decision is based upon much more satisfactory reasonings.

" The conclusion reached by that court, after a careful consideration of the whole subject, is that the 14th amendment of the Constitution of the United States has not in any manner, or to any extent, impaired, weakened, or taken away any of the reserved rights of the States, as they had existed and been fully recognized by every department of the national government from its creation; it conferred citizenship upon all persons born in the United States, and subject to their jurisdiction, and it did no more. These views have to a large extent, met with the approval of the Supreme Court of the United States. In the Slaughter House Case, 16 Wallace, 36, the Legislature of Louisiana had conferred upon the The Crescent City Live Stock, Landing and Slaughter House Company, certain exclusive privileges, denied to other citizens of Louisiana, which was regarded an oppression and unjust to them, and raised the question: whether since the passage of the 14th amendment of the Constitution of the United States, 'can any exclusive privileges be granted any of its citizens or to a corporation by the legislature of a State.' It was insisted that such an act was a violation of the 13th amendment of the Constitution of the United States, as it created 'an involuntary servitude.' The Court, in its opininon, delivered by Justice Miller, says (page 69): 'To withdraw the mind from the contemplation of the grand and simple declaration of the 13th amendment, of the personal freedom of all the human race within the jurisdiction of this Government, and with a microscopic search, endeavor to find in it a reference to servitudes which may have been attached to property in certain localities, requires an effort, to say the least. That a personal servitude was meant is proved by the use of the word 'involuntary,' which can only apply to human beings.' The court deemed it unnecessary to say anything more upon the application of this article of the constitution to the

Louisiana statute; the 13th amendment of the Constitution, in their judgment, evidently had no bearing on the case. The court, in considering the meaning and effect of the 14th Amendment of the Constitution, says: 'That its main purpose was to establish the citizenship of the negro can admit of no doubt. The phrase, 'subject to its jurisdiction,' was intended to exclude from its operation children of ministers, consuls, and citizens, or subjects of foreign states, born within the United States,' page 73; with reference to the next clause the Court says: 'The language is, no State shall make or enforce any law that shall abridge the privileges or immunities of citizens of the United States. It is a little remarkable, if this clause was intended as a protection to a citizen of a State against the legislative power of his own State, that the words, "citizen of the State," should be left out, when it is so carefully used, and used in contradistinction from "citizens of the United States," in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.' The circuit court of Northern Georgia, in the case above cited, seems to have lost sight of what seems so clear to the Supreme Court. The conclusion of the Supreme Court is, that 'the privileges and immunities belonging to citizens of a State, as such, must rest for their security and protection where they have heretofore rested; for they are not embraced by this paragraph of the amendment,' and again it says: 'with very few exceptions, the entire domain of the privileges and immunities of citizens of the States lay within the constitutional and legislative power of the States, and without that of the Federal Government. Was it the purpose of the 14th amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States* to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal

Government? And when it is declared that Congress shall have power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States? All this must follow from the construction insisted upon. Such construction would constitute this Court a perpetual censor upon all legislation of the States on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with these rights, as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive, which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and prevailing, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when in fact it radically changes the whole theory of the relations of the State and Federal governments to each other, and of both these governments to the people; the argument has a force that is irresistible, in the absence of language which expresses such a purpose too clearly to admit of doubt.'

"The next clause of the first section of the 14th amendment is: 'Nor shall any State deprive any person of life, liberty or property without due process of law.' The court in reference to this says: 'this paragraph has been in the Constitution since the passage of the 5th amendment, as a restraint upon the Federal power. It is also to be found in some form of expression in the constitutions of nearly all the States, as a restraint upon the powers of the States. This law, then, has practically been the same as it now is during the existence of the government, except so far as the present amendment may place the restraining power over

the States in this matter in the hands of the Federal Government.' It was held by the court that this provision could in no manner affect the question under consideration.

"The only remaining clause in this first section of the 14th amendment of the Constitution is: 'Nor shall any State deny to any person within its jurisdiction, the equal protection of the laws.' Upon the true meaning of this clause, the Supreme Court of the United States, in the Slaughter-House case, say but little; they seem to regard it as obvious that the case before them, the giving of exclusive privileges to some citizens of a State by a State law which was denied to others, was no violation of this provision; and that its operation and effect would probably be confined to very few cases; they use language which implies that it ought probably to be confined to the single case of legislation directed against negroes as a class. The language used is: 'We doubt very much whether any action of a State, not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clear a provision for that case and that emergency, that a strong case would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave the matter until Congress shall have exercised its power, or some case of State oppression, by denial of equal justice in its courts, shall have claimed a decision at our hands.' I can see no reason why the court should have considered that under this provision of this amendment, 'it was a State that was to be dealt with, and not alone the validity of its laws,' any more than under the preceding paragraph, which provides that 'no State shall deprive any person of life, liberty, or property, without due process of law,' or any more than under numerous other provisions of the Constitution, such as those contained in the tenth section of arti-

cle/one, where it is said no State shall do a number of things enumerated—all these restrictions on the powers of the State have, so far as I know, been enforced simply by regarding acts, done in violation of these provisions, nullities: and I see no reason why the provisions of the 14th amendment of the Constitution should not be so construed and enforced. Again, the court seems to think a much stronger case of unjust discrimination by a State against any class of its inhabitants, such as Chinese, Catholics, Mormons, naturalized foreigners, or women, would be required to be made out, before a case could come within the purview of this provision in the 14th amendment, than would have to be made out if the discrimination were against negroes. I cannot believe that the States, which adopted this amendment, designed thereby to secure to the negroes any rights or privileges that were not equally secured to all others. It is true that the occasion for this provision, and all the other provisions of the 13th and 14th amendments, was the supposed necessity of protecting the negro; but special care was taken to extend these provisions to all persons whatsoever. The language is as broad as it possible can be: 'No person shall be denied the equal protection of the laws.' A Chinaman or a naturalized foreigner or Roman Catholic is obviously under this provision entitled to this equal protection of the laws to the same extent as a negro; and though the Supreme Court has used this language, I cannot believe, when the case arises, that they can, or will, in any decision they may render, discriminate against others in favor of the negro.

"If they had held the law of Kentucky, forbidding a negro to testify for or against a white person, unconstitutional, they would assuredly have held the law of California, prohibiting a Chinese to testify for or against a white person, also unconstitutional. From the general tenor of the decisions of the Supreme Court, it is fair to conclude that they regard the position taken by the supreme court of Indiana, if not

entirely sound, as substantially so; and that the thirteenth and fourteenth amendments of the Constitution of the United States have little or no other effect than to abolish slavery and declare a negro a citizen, when born in the United States; and that the powers of the State legislatures over the civil rights, privileges, duties, or immunities of any and all of its citizens, whether negroes or whites, remain as they always were; and that no power with reference to these rights is conferred by Congress on the Federal judiciary. This decision of the Supreme Court has since been followed up by others, based on the same views of the meaning of these amendments of the Constitution. Thus in Bradwell *vs.* The State, 16 Wall., 130, the court decided that the decision of the supreme court of Illinois, that a woman resident in Illinois ought to be refused a license to practice law in the courts of that State, by the law of that State, was no violation of the fourteenth amendment of the Constitution of the United States; basing that decision on the broad ground that no matter what laws a State may pass relative to its own citizens, their rights or immunities, such law would not violate this amendment of the Constitution; and on these principles, any State could prohibit a Chinese or a negro, or a white man, resident in the State, from practicing law or sitting on a jury, or giving evidence in its State courts. In the same spirit, the 3d and 4th sections of the act of May 31, 1870, (16 Stat. 140,) providing for the punishment of State officers of election and others, was pronounced unconstitutional by the Supreme Court, in the case of the United States *vs.* Reese *et al.*, 2 Otto, p. 215, the same not being regarded as 'appropriate legislation,' within the meaning of the 15th amendment of the Constitution. And in the United States *vs.* Cruikshank, 2 Otto R., 542, the Supreme Court decided that the 14th amendment of the Constitution of the United States prohibits a State from depriving any person of life, liberty or property, without due process of law, and from denying to any person

within its jurisdiction the equal protection of the laws; but it adds nothing to the rights of one citizen against another. It simply furnishes an additional guaranty against the encroachment by the States upon the fundamental rights, which belong to every citizen as a member of society. The duty of protecting all its citizens in the enjoyment of an equality of rights was originally assumed by the States, and it still remains there.

"I will follow the example of the Supreme Court of the United States in the *Slaughter-House cases*, 16 Wall., 81, and not undertake to state my views of the cases, to which the last clause of the first section of the 14th amendment may apply, till some case arises of oppression by the State, by the denying of equal protection of the laws to some person within its jurisdiction; and content myself, as they did, with saying that we find no such case in the one before us. For this is obviously no such case. The prisoner has not been denied the equal protection of the laws of West Virginia. It follows from the case of Blyew *vs.* the United States, 13 Wall., 581, that in the opinion of the Supreme Court, the prisoner could not be regarded as being denied the equal protection of the laws, if white persons had been, as they were, permitted to testify against him, even if our State laws had prohibited, which they do not, a negro to testify in an exactly similar case against a white prisoner on trial. And surely, if this be the case, the mere prohibition of negroes to sit upon the jury which tried him cannot be regarded as the denial of equal protection of the laws to him. The negro has no more right to insist upon the equal protection of the laws than a Chinaman or a woman. And surely it will not be pretended that a State, which by its laws prohibits a Chinaman or a woman from sitting on a jury, does thereby deny to a Chinaman or a woman, who is being tried for a felony, the equal protection of the laws. Has not a woman as much right to insist that a State, by its laws, must permit her to be defended by a woman as

her counsel, as she has to insist that women should be allowed to sit on a jury which tries her. And yet the Supreme Court of the United States decided in the case of Bradwell *vs.* The State, 16 Wall., 130, that a State has a right to prohibit women from acting as counsel in any case. I agree with the Supreme Court in the *Slaughter-House cases*, that it is doubtful whether in the future, any action of a State is likely to occur, which will ever be held to come within the purview of this last clause of the first section of the 14th amendment, prohibiting a State to deny to any person the equal protection of its laws. But I cannot think that a State is likely to bring a case within the purview of this provision, by discriminating against the negro in such manner as to deny to the negro the equal protection of the law, as it has been heretofore interpreted. And, as I have before said, I believe the interpretation of this provision ought and must be the same, whether applied to negroes, Chinamen, women, or other persons. I know of no State law which has been passed since the adoption of this amendment of the Constitution which violates it by thus discriminating against negroes; and though there have been some State laws, even in our own State, which would perhaps be regarded as violating this provision of the Constitution of the United States, yet they were directed not against negroes, but against white persons. They have, however, been repealed, and it is not likely that such acts will ever be again passed in any State.

"It is confidently believed that no such acts will be ever again enacted in this State. An example of this sort of legislation may be found in the act passed February 28, 1865, and re-enacted in the Code of West Virginia, of 1868. (See Code of West Virginia, chap. 136, sections 10, 11, 12, and 13, page 645.) This act prohibited any person who had abetted the Confederate States from suing a person who had remained loyal to the Government of the United States.

"The views I have expressed show clearly, that in the

case before us, the circuit court did not err in refusing to order the removal of this case to the United States Court for trial. The prisoner, in his petition, based his application for such removal on two grounds: first, because a false impression prevailed throughout the State of West Virginia, that colored men are not entitled to the same protection in the marital relation as white men. This amounts to an allegation that prejudices exist in this State relative to negroes, that would injuriously affect him, if he were tried before the State courts. It is obvious from what has been said, that in my opinion this gives him no right to have the trial of his case removed to the Federal court. If it did, any citizen of this State, white or black, could at his pleasure, on affidavit, remove any case, civil or criminal, from the State to the Federal courts. The other ground alleged in the petition for the removal of the cause to the Federal court, is that under the laws of West Virginia none but white pe.sons are allowed to serve as jurors, and, therefore, he being a negro, has not the equal protection of the laws.

"We have seen that in the trial of a citizen of this State, for an offense committed in the State against her laws, the prisoner could in no case have a right to have the trial removed to the Federal court; the 14th amendment not being intended to protect the citizens of any State against unjust legislation by their own State. In the particular case before us, I cannot see why a jury of white men would not be quite as likely to do justice to the prisoner as a jury of negroes; but if it were otherwise, it would give him no right to have his case removed to the Federal court for trial."

Supreme Court of the United States.

OCTOBER TERM, 1879.

TAYLOR STRAUDER *vs.* STATE OF WEST VIRGINIA.	}	753.

Additional Notes of Robert White, Attorney-General of West Virginia.

The jury law of West Virginia, so far as necessary for the understanding of this case, as found in the Acts of the Legislature of West Virginia, 1872–3, has been printed and filed with the record in this cause.

The defendant did not ask for special jury provided for in 27th section.

It is an assumption not authorized, to say that the first section of that act was passed upon "account of race or color." Other reasons may have influenced the legislature.

See People vs. Brady, 40 Cal., p. 211.

The first section of the jury law aforesaid, as it is found in the acts of 1872–3 aforesaid, is substantially the same law as has existed in Virginia and West Virginia since 1853.—(See Code of West Virginia, p. 579; Code of Virginia, 1860, p. 687.) Before 1852–3 there was property qualification for jurors.

ROBERT WHITE,
Atty-Gen. of West Va.

SUPREME COURT OF THE UNITED STATES.

No. 753, October Term, 1879.

Taylor Strauder, Plaintiff in Error,
vs.
State of West Virginia.

Jury Laws so far as Applicable to Case of Strauder vs. State.

Who liable to serve and who exempt as jurors.

"1. All white male persons, who are twenty-one years of age, and not over sixty, and who are citizens of this state, shall be liable to serve as jurors, except as herein provided.

"2. The governor of the state, practicing attorneys and physicians, officers of any court, all telegraph operators actually engaged as such in any office in this state, and all persons mentioned in the second and fourth sections of chapter nineteen as exempted from military duty, (except school commissioners, persons exempted under the second section by reason of having relatives dependent upon them for support, or in the military service of the United States, or of this state, officers of the militia, who resign their commissions after serving seven years successively, and officers and members of a uniformed and armed volunteer company, who shall have served three years,) shall be exempted from serving on juries.

"3. In case of a felony, a list of twenty qualified jurors shall be made from those in attendance, or who

may be summoned by order of the court, from which the accused may strike off eight, or a less number, of the names on said list; and if he fail to do so, the number not stricken off by him shall be stricken off by the prosecuting attorney, so as to reduce the panel to twelve, who shall compose the jury for the trial of the cause, but the accused shall have no other peremptory challenge.

"4. When any court thinks it necessary, it may order its sheriff or other officer to summon any number of jurors to attend forthwith, or at any subsequent day of the term.

"5. If any sheriff fail to summon jurors according to the preceding section, or shall knowingly summon persons not qualified to serve, or exempt from serving as jurors, he shall be fined by the court not exceeding twenty dollars; and if any person so summoned fail to attend as required, without sufficient excuse, he shall be fined by the court eight dollars.

* * * * * * *

Juries, how organized and summoned.

"7. The county court, or other court or tribunal adopted in lieu of a county court, of each county, shall, at the long term thereof, when a majority of all the justices of the peace of the county are present and acting, annually prepare a list of such inhabitants of the county, not exempted as aforesaid, as they shall think well qualified to serve as jurors, being persons of sound judgment, and free from legal exception, which list shall include at least twenty persons for every thousand inhabitants in such county; but in no case shall such list include a less number than one hundred persons.

"8. The list so prepared shall be delivered to the clerk of the said county court, or other court or tribunal adopted in lieu of a county court, to be by him safely

kept, subject only to the inspection of the court, or of the clerk of the circuit court, or a justice of the peace, as hereinafter prescribed; and the court may strike from such list the name of any person who has been convicted of any scandalous offences, or been guilty of any gross immorality.

"9. At the time such list is made out, the court, or other court or tribunal, adopted in lieu of a county court, shall also cause all the names upon the same to be fairly written, each on a separate paper or ballot, and shall fold or roll up the ballots so as to resemble each other as nearly as may be, and so that the name written thereon shall not be visible on the outside, and shall deposit the ballots in a secure box, to be prepared for the purpose, which shall be safely kept by the clerk, and shall be opened only by the order of the court, or other court or tribunal adopted in lieu of a county court, or as hereinafter prescribed.

"10. All jurors required for the trial of cases in any circuit or county court, shall be selected by drawing ballots from the said box in the manner prescribed in this act, and the persons whose names are written on the ballots so drawn shall be returned to serve as jurors.

"11. The clerk of every court shall, at least thirty days before any term of such court at which a jury may be wanted, issue a writ of venire facias for thirty jurors, unless the court shall order a greater or less number, in which event the writ shall issue for such other number. Such writ shall require the attendance of the jurors on the first day of the court, or on such other day thereof as the court or judge may order.

"12. At the same time the clerk shall issue a summons in the name of the state, requiring, if it be for the circuit court, the clerk of the county court, and if it be for the county court, the clerk of the circuit court, to attend at the clerk's office of the county court of

such county, on a day named in such summons, which shall not be less than twenty days before such term, for the purpose of drawing the ballots for the number of jurors mentioned in said writ. If the clerk of the county court be also clerk of the circuit court, the summons shall require a justice of the peace to attend for such purpose.

"13. The writ of venire facias and summons shall be delivered to the sheriff, or other officer, who shall serve the summons on the clerk of the circuit court, the clerk of the county court, or a justice of the peace, as the case may be; and it shall be the duty of such clerk or justice of the peace to attend, on the day designated in the summons, at the clerk's office of the county court of the county, and in the presence of the clerk of the court for which the jury is to be drawn, to cause the proper number of jurors to be drawn from the box, and a list thereof to be delivered to the officer serving the summons.

"14. If the clerk or justice aforesaid fail to attend as required by said summons, such jurors shall be drawn by the clerk of the court for whose court the jury is to be summoned, in the presence of some other justice called for that purpose, whose duty it shall be to place the list thereof in the hands of the sheriff or other officer. And it shall be the duty of such officer, at least three days before the time when the jurors are required to attend, to summon each person who is drawn to attend the sitting of the court at the time and place mentioned in the writ, and make a due return thereof, and of the summons aforesaid, to such court at the opening thereof.

"15. When jurors are to be drawn as aforesaid, the ballots in the jury box shall be shaken and mixed together, and the clerk or justice shall openly draw therefrom as many ballots (without inspecting the names written on any until the proper number is

drawn,) as shall be equal to the number of jurors required; and if any person, whose name is so drawn, is exempted by law, or is unable, by reason of sickness, absence from home, or other cause, to attend as a juror, his name shall be returned into the box; or, if his name has been struck from the jury list, the ballot shall be destroyed, and another shall be drawn in its stead.

"16. When any person is drawn and returned to serve as aforesaid, the clerk or justice shall cause to be indorsed on the ballot containing his name the word "drawn," and shall return it to the box, and the date of the draft shall be entered on the list of jurors opposite his name.

* * * * * * *

"18. Nothing contained in the preceding sections shall prevent any court from issuing writs of venire facias in term time for additional jurors, or requiring other jurors to be summoned by the sheriff without such writ, whenever it shall be found necessary for the convenient dispatch of business; in which case the writ, if issued, shall be served and returned, and the jurors shall be required to attend on such days as the court shall direct.

"19. On the day when the jurors are summoned to attend at any court, the clerk shall write the name of each one who shall be in attendance and not excused, on a separate paper or ballot, and place the same in a box to be kept for that purpose, in the manner prescribed in the ninth section of this act, and juries for the trial of cases shall be selected therefrom by lot.

"20. If any person duly summoned to attend as a juror in any court shall neglect to attend, without any sufficient excuse, he shall pay a fine, not exceeding twenty dollars, which shall be imposed by the court.

* * * * * * *

Qualification and disqualification of jurors; when excepted to.

"23. The court shall, on motion of either party in any suit, examine on oath any person who is called as a juror therein, to know whether he is a qualified juror, or is related to either party, or has any interest in the cause, or is sensible of any bias or prejudice therein; and the party objecting to the juror may introduce any other competent evidence in support of the objection; and if it shall appear to the court that such person is not a qualified juror, or does not stand indifferent in the cause, another shall be called and placed in his stead for the trial of that cause. And in every case the plaintiff and defendant may each challenge four jurors peremptorily.

"24. No exception shall be allowed against a juror after he is sworn upon the jury, on account of his age or other legal disability, unless by leave of court.

"25. No irregularity in any writ of venire facias, or in the drawing, summoning, or impanelling of jurors, shall be sufficient to set aside a verdict, unless the party making the objection was injured by the irregularity, or unless the objection was made before the swearing of the jury.

* * * * * * *

Special Juries.

"27. Any court may allow a special jury in any case to be formed in the following manner, viz: The court shall direct the sheriff to form a panel of twenty qualified jurors, whom he shall summon, and who are free from just cause of exception, from which sixteen shall be chosen by lot; the parties thereupon, beginning with the plaintiff's attorney, or the prosecuting attorney when the state is a party, shall alternately strike off one, until the number be reduced to twelve; which number shall compose the jury for the trial of the case.

* * * * * * *

Trial by jury may be waived or the number reduced by consent.

"35. In any case, except a case of felony, in which a trial by jury would be otherwise proper, the parties or their counsel, by consent entered of record, may waive the right to have a jury, and thereupon the whole matter of law and fact may be heard and determined, and judgment given by the court; or by like consent, the jury may consist of seven, and in that case a verdict shall be as valid, and have the same effect as if it had been found by a jury of twelve."

* * * * * * *

It is stipulated and agreed by the Attorney-General of West Virginia and the counsel for Taylor Strander, that the foregoing is all the jury law of West Virginia applicable to the case of Strander vs. West Virginia, now under argument in the Supreme Court of the United States, except so much thereof as refers to the pay of jurors, and the punishment in case of their failure to attend when summoned, for which provision is made.

October 21st, 1879.

ROB. WHITE, *Atty-Gen.*
GEO. O. DAVENPORT,
Counsel for Taylor Strander.

1879

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 4.—ORIGINAL.

EX PARTE: IN THE MATTER OF THE COMMONWEALTH OF VIRGINIA, PETITIONER.

PETITION FOR MANDAMUS.

FILED MARCH 10, 1879.

Virginia vs Rives

SUPREME COURT OF THE UNITED STATES.

No. 4.—ORIGINAL.

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PETITION FOR MANDAMUS.

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Petition for mandamus.

In the Supreme Court of the United States.

COMMONWEALTH OF VIRGINIA }
ex
JUDGE ALEXANDER RIVES. }

To the honorable the Supreme Court of the United States:

The Commonwealth of Virginia, by F. W. M. Holliday, her governor, begs leave to file this petition, and to represent that the jurisdiction of the courts of the said commonwealth has been unlawfully invaded by Judge Alexander Rives, judge of the district court of the United States for the western district of Virginia, under color of his office as such judge, and has by a mandate of the circuit court of the western district of Virginia, held by him as such judge at Danville, directed to the United States marshal, taken from the jail of Patrick County, Virginia, two persons held in custody for a violation of the criminal laws of said commonwealth, one of whom had been tried, convicted, and sentenced to the penitentiary of the State; the other was awaiting his trial before the proper court. The following is a statement of facts connected with the said illegal invasion of the State's jurisdiction:

Burwell Reynolds and Lee Reynolds, two brothers, were jointly indicted for the murder of A. C. Shelton, in the county of Patrick, in November, 1877. At the spring term (1878) of the cir'uit court of Patrick, there were separate trials. In the case of Burwell Reynolds the
2 jury found a verdict of guilty of murder in the first degree, which verdict, on motion, was set aside by the court and a new trial awarded.

In the case of Lee Reynolds there was a verdict of murder in the second degree, and the term of confinement in the penitentiary ascertained at eighteen years. A motion for a new trial was made, but the court overruled it and entered up a judgment upon the verdict. A bill of exceptions was filed to the opinion of the circuit court, and upon application a writ of error was awarded by one of the judges of the supreme court of appeals. At Wytheville, in July last, the appeal was heard, the judgment of the circuit court reversed, the verdict of the jury set aside, and a new trial awarded. At the last term of the circuit court of Patrick, held in November, Burwell Reynolds and Lee Reynolds were again tried. Lee Reynolds was again convicted of murder in the second degree, and the term of his imprisonment in the penitentiary ascertained at eighteen years.

The trial of Burwell Reynolds resulted in a hung jury. When the court came to impanel the jury, the counsel for the accused moved the court to discharge the venire and award a new venire facias, with instructions to the sheriff, in executing it, to summon as veniremen a number of persons of their own race, they being colored. This motion was overruled. Thereupon an application was made for the removal of the cases from the said circuit court to the circuit court of the United States for the western district of Virginia. This application was denied.

The case of Burwell Reynolds was continued until the next term of the circuit court of Patrick, and Lee Reynolds was sentenced according to law upon the verdict of the jury rendered in his case. Burwell and Lee Reynolds were remanded to the jail of Patrick County, the former to await his trial at the next term of the court, and the latter his removal to the penitentiary under the judgment of the court. On motion

of counsel, who desired to apply for a writ of error, the execution of the judgment of the court was suspended for sixty days to afford an opportunity to apply therefor; but under this suspending order no such application has been made. A copy of the record of the proceedings in the said State courts is herewith filed and asked to be taken as a part of this petition.

On the 15th day of November, 1878, in the circuit court of the United States for the western district of Virginia, then being held by
3 Judge Rives, in the town of Danville, a petition was filed on behalf of Burwell Reynolds and Lee Reynolds, praying for the removal of their cases from the circuit court of Patrick County to the circuit court of the United States for the western district of Virginia for trial. The circuit court of the United States, or the judge thereof, "being of opinion that said petitioners had been denied such a trial as is secured to them by the laws of this State, by competent jurors, without distinction of race or color, directed said cases, upon the petition aforesaid, to be docketed in the said court for trial," and authorized the clerk of said court to issue forthwith a writ of habeas corpus cum causa to the marshal of said district, commanding him to take the bodies of the said petitioners into his custody, to be dealt with according to law and the orders of the said United States court. And the clerk of said court was ordered to direct, in vacation, to the said marshal a writ of venire facias for twenty-five jurors, qualified as such by the laws of this State, without distinction of race or color, to attend on the first day of the next term for the trial of said cases at the bar of said court.

A copy of the order of the said United States court is herewith filed and asked to be taken as a part of this statement, and is as follows:

At a circuit court for the western district of Virginia, held at Danville on the 15th day of November, 1878, Burwell and Lee Reynolds, by their counsel, submitted to the court a petition, by them presented to the judge of the circuit court for the county of Patrick, for the removal of the prosecutions against them into this court, which petition is a part of the record which said petitioners have procured of the clerk of the said circuit court of Patrick, and now offer to file in this court, praying that said prosecutions may be here docketed and proceeded with here. The court being of opinion that said petitioners have been denied such a trial as is secured to them by the laws of this State, by competent jurors, without distinction of race or color, doth direct said causes, upon the petition aforesaid, to be docketed in this court for trial; and the clerk is hereby authorized to issue forthwith a writ of habeas corpus cum causa to the marshal of this district to take the bodies of said defendants into his custody, to be dealt with according to law and the orders of this court; and that the clerk of this court, in the vacation thereof, direct to said marshal a writ of venire facias for twenty-five jurors, qualified as such by the laws of this State, without distinction of race or color, to attend on the first day of next term for the trial of said cases at the bar of this court.

A copy. Teste:

CH. P. LATHAM,
Clerk.

Your petitioner is advised that in this proceeding the said Judge Alexander Rives has transcended the jurisdiction of his court, and has undertaken the exercise of powers not vested in him or his court by any law of the United States.

1 The said Lee and Burwell Reynolds are now held by warrant of the said judge by the marshal of the western district of Virginia, and withheld from the proper custody of the said commonwealth and its officers.

Your petitioner is informed, and so believes and charges, that it is the intention of the said Judge Alexander Rives, by color of his office as judge as aforesaid, to hold the said two persons in custody, and to try them in the circuit court of the United States for the western district of Virginia, at the next term of said court to be held in the town of Danville, for the offences aforesaid committed against the laws of the said commonwealth.

Your petitioner therefore prays that a rule be awarded by this court requiring the said Alexander Rives, judge of the district court of the United States for the western district of Virginia, to show cause why a mandamus should not be issued, commanding him to cause to be re-delivered by the marshal of said district to the jailor of Patrick County, the bodies of the said Lee and Burwell Reynolds, to be dealt with according to the laws of the said commonwealth.

F. W. M. HOLLIDAY,
Governor of Virginia,
By JAS. G. FIELD,
Attorney General of Virginia.

4 COMMONWEALTH OF VIRGINIA
vs.
ALEXANDER RIVES, JUDGE.

Copy of record of proceedings in State court file as exhibit, with petition.

Exhibit attached to petition.

Pleas at the court-house, in the county of Patrick, before the circuit court for said county of Patrick, on the 31st day of October, 1878.

Grand jury.

Be it remembered that the grand jurors, E. B. Turner, foreman, Alexander Thompson, A. J. Willis, Claiborne Edins, J. H. Cruise, S. J. Martin, J. T. Clark, J. F. Noel, E. P. Barnard, W. R. Hagood, Isham Cochram, A. J. Harbour, A. L. Spencer, P. L. Penn, and James Boyd, empannelled and sworn in the county court of Patrick County, at the term thereof commencing on the 29th day of January, 1878, in and for the body of said county, and attending the said court, were charged and sent to their room to consult, and after some time returned into court and presented: An indictment against Burwell Reynolds and Lee Reynolds for murder, a true bill; which indictment, with the endorsement thereon by the foreman, is in the words following, to wit:

Indictment.

STATE OF VIRGINIA,
County of Patrick, to wit:

The jurors of the commonwealth of Virginia in and for the body of the county of Patrick, and now attending the said court, upon their oaths present that Burwell Reynolds, late of said county, laborer, and Lee Reynolds, late of said county, laborer, on the 29th day of November

in the year of our Lord 1877, with force and arms, at aforesaid, in the county aforesaid, in and upon one Aaron C. Shelton, in the peace of God, and of the said State, then and there being, feloniously, wilfully, and of their malice aforethought, did make an assault, and that they, the said Burwell Reynolds and the said Lee Reynolds, with a certain knife of the value of fifty cents, in the hands of the said Burwell Reynolds, then and there being had and held, the said Aaron C. Shelton, in and upon the left side of the body, on the left side of the backbone, and between the ribs of him, the said Aaron C. Shelton, then and there feloniously, wilfully, and of their malice aforethought, did strike and thrust, giving to the said Aaron C. Shelton, then and there, with the knife aforesaid, in and upon the left side of the body, on the left side of the backbone, between the ribs of him, the said Aaron C. Shelton, one mortal wound of the breadth of one inch and a half, and of the depth of four inches, of which said wound the said Aaron C. Shelton, from the 29th day of November, in the year aforesaid, until the first day of December, in the same year, at aforesaid, did languish, and languishing did live, on which said first day of December, in the year aforesaid, the said Aaron C. Shelton, at aforesaid, in the county aforesaid, of the said mortal wound, died. And so the jurors aforesaid, upon their oaths aforesaid, do say that the said Burwell Reynolds, and the said Lee Reynolds, him, the said Aaron C. Shelton, in the manner and by the means aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, against the peace and dignity of the commonwealth of Virginia.

5 *Second count.*

And the jurors aforesaid, upon their oaths aforesaid, do further present that the said Burwell Reynolds, late of the said county, laborer, and the said Lee Reynolds, late of the county aforesaid, laborer, on the 29th day of November, in the year of our Lord 1877, with force and arms, at aforesaid, in the county aforesaid, in and upon the said Aaron C. Shelton, in the peace of God and the said State, then and there being, feloniously, wilfully, and of their malice aforethought, did make an assault, and that he, the said Burwell Reynolds, with a certain knife of the value of fifty cents, which he, the said Burwell Reynolds, in his hands then and there had and held, the said Aaron C. Shelton in and upon the left side of the body, on the left side of the backbone, between the ribs of him, the said Aaron C. Shelton, then and there feloniously, wilfully, and of his malice aforethought, did strike and thrust, giving to the said Aaron C. Shelton, then and there, with the knife aforesaid, in and upon the left side of the body, on the left side of the backbone, between the ribs of him, the said Aaron C. Shelton, one mortal wound of the breadth of one inch and a half, and of the depth of four inches, of which said mortal wound the said Aaron C. Shelton, from the said 29th day of November, in the year aforesaid, until the first day of December, in the same year, at aforesaid, in the county aforesaid, did languish, and languishing did live, on which said first day of December, in the year aforesaid, the said Aaron C. Shelton, at aforesaid, in the county aforesaid, of said mortal wound, died; and that the said Lee Reynolds, at the time of committing the felony and murder aforesaid by the said Burwell Reynolds, in the manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, was present, aiding, helping, abetting, assisting, comforting, and maintaining the said Burwell Reynolds, the felony and murder

aforesaid in manner and form aforesaid, to do, commit, and perpetrate. And so the jurors aforesaid, upon their oath aforesaid, do say that the said Burwell Reynolds, and the said Lee Reynolds, him, the said Aaron C. Shelton, in the manner and by the means aforesaid, feloniously, wilfully, and of their malice aforethought, did kill and murder, against the peace and dignity of the commonwealth of Virginia, upon the evidence of Green Shelton, A. A. Shelton, and Alice Nowlin, sworn in court to give evidence before the grand jury.

A true bill.

E. B. TURNER,
Foreman.

And now, at this day, to wit, at a county court continued and held for the county of Patrick, at the court-house thereof, on the 31st day of January, 1878:

Arraignment, plea, and remanded to circuit court.

BURWELL REYNOLDS.

Burwell Reynolds, late of the county of Patrick, laborer, who stands jointly indicted with Lee Reynolds for murder, electing to be tried separately, was led to the bar in custody of the jailor of this court, and on being arraigned plead not guilty to the indictment, and demanded
6 to be tried in the circuit court of this county, whereupon it is ordered by the said county court that the said Burwell Reynolds be remanded to the jail of this county for trial before the said circuit court at the next term thereof, and that all witnesses for the prosecution be recognized to appear before the said circuit court on the first day of the said next term, and that the clerk of this court certify and transmit to the clerk of the said circuit court a transcript of the proceedings in this court in relation to the prosecution, and a copy of the indictment, all recognizances, and the other papers connected with the case.

Recognizance of witnesses.

A. A. Shelton, J. T. Craddock, J. M. Rogers, T. S. Campbell, J. P. Fulcher, Alice Nowlin, Naomi Shelton, Haman Shelton, and Green Shelton, being minors, by their father, A. A. Shelton, came into court and acknowledged themselves to be severally indebted to the commonwealth of Virginia in the sum of $100 each of their respective goods and chattels, lands and tenements, to be levied for the use of the commonwealth, rendered; yet, upon this condition, that if the said parties shall make their personal appearance before the said circuit court on the first day of the next term, to give on behalf of the commonwealth against Burwell Reynolds and Lee Reynolds, charged with murder, and shall not depart thence without the leave of the said court, but to remain in full force and virtue as to each of said parties as shall fail to appear.

Arraignment, plea, and remanded to circuit court.

LEE REYNOLDS.

Lee Reynolds, late of the county of Patrick, laborer, who stands indicted, with Burwell Reynolds, for murder, electing to be tried separately, was led to the bar in custody of the jailor of this court, and, on

being arraigned, plead not guilty to the indictment; whereupon the said Lee Reynolds demanded to be tried in the circuit court of this county. It was thereupon ordered that the said Lee Reynolds be remanded to the jail of this county for trial before the said circuit court at the next term, and that all material witnesses for the prosecution be recognized for their appearance before the said circuit court on the first day of the next term; and that the clerk of this court certify and transmit to the clerk of said circuit court a transcript of the record of the proceedings in the county court, in relation to the prosecution, and a copy of the indictment, all recognizances, and all other papers connected with the case. (See first case.)

Declaration of Aaron C. Shelton.

COMMONWEALTH
vs.
BURWELL AND LEE REYNOLDS.

The deposition of Aaron C. Shelton, taken before me, William W. Moir, a commissioner in chancery of Patrick County court, on the first day of December, 1877, at the residence of Joshua Craddock, in Patrick County, Virginia, upon what his physician supposes to be his death-bed, to be read as evidence in any prosecution of the commonwealth against the said parties.

The said Aaron C. Shelton, first being duly sworn, deposeth as follows:

On the 29th November, I was hauling stocks on the hill this side of T. S. Campbell's mill, and Asa Tuggle was cutting; Lee Reynolds came up, and I said to him, "I suppose you have threatened to take my life with that stick and gun"; and he said that he would kill me if I did not run, and if I ran, that he would make his two dogs, then with him, catch me. I said to him, "Look here, boy; do you know who you are talking to?" I was sitting on the wagon at this time, and then got off the wagon to load my log; and just as I got off the wagon he cocked his gun, and I stepped up to him as quick as I could and jerked the stick from him and knocked him over the log that we were going to load on the wagon; and just as he fell Burwell Reynolds ran up and stabbed me, with a large knife, in my back. The stick now shown me is the one that I jerked from Lee Reynolds and struck him with. When he stabbed me I fell, and they both ran off and left me.

his
AARON C. + SHELTON.
mark.

Witness:
J. T. CLARK.
A copy. Teste:

L. G. RUCKER, *Clerk.*

At another day, to wit, at a circuit court held for the county of Patrick, at the court-house thereof, on the first day of April, 1878.

Motion for mixed jury.

Burwell Reynolds, late of the county of Patrick, laborer, and Lee Reynolds, late of the county of Patrick, laborer, who stand jointly indicted for murder, were led to the bar in custody of the jailor of this court.

Whereupon the accused by counsel moved the court that the venire, in this case composed entirely of the white race, be so modified as to allow one-third of the venire to be composed of their race, they being colored, which motion was overruled upon the ground that the court had no authority to change the venire, it appearing to the satisfaction of the court that the said venire had been regularly drawn from the jury-box according to law. The accused by counsel then appealed to the attorney for the commonwealth and the counsel assisting in the prosecution that, as the ballots in the jury-box were entirely of the white race, they, the said attorney for the commonwealth and the feed counsel assisting in the prosecution, allow them, the accused, a venire composed of one-third of their own race—they, the accused, waiving all objection to the illegality of so constructing the same; which the attorney for the commonwealth and the feed counsel for the prosecution refused.

8 *Motion to remove to United States circuit court.*

Thereupon the prisoners by counsel filed their petition, verified by their affidavits, praying that this prosecution may be removed to the next circuit court to be held for the United States for the western district of Virginia, in the town of Danville, which prayer was denied by the court; which petition is in words and figures following, to wit:

Petition of prisoners for removal.

To the judge of the circuit court of Patrick:

Your petitioners, Lee and Burwell Reynolds, represent that there is now pending against them a criminal prosecution in the circuit court of Patrick, in which they are charged with the murder of one Aaron Shelton. Your petitioners are negroes, aged respectively 17 and 19 years. That the man whom they are charged with having murdered was a white man.

Your petitioners allege that the right secured to them by the law providing for the equal civil rights of all the citizens of the United States is denied to them in the judicial tribunals of the county of Patrick, of which county they are natives and citizens. They allege that by the laws of Virginia all male citizens twenty-one years of age and not over sixty, who are entitled to vote and hold office under the constitution and laws of this State, shall be liable to serve as jurors. This law allows the right as well as requires the duty of the race to which they belong to serve as jurors. Yet the grand jury who has made the indictment against them, as well as the venire summoned to try them, are exclusively composed of the white race. They have applied through their counsel to your honor, the judge of said court, and also to the prosecuting attorney of said county, as well as to the feed counsel employed to assist in the prosecution, that a portion of the venire by which they are to be tried in said circuit court of Patrick should be, at least in part, composed of competent jurors of their own race and color; this right has been refused them.

They allege that a strong prejudice exists in the community of said county against them independent of the merits of the case, and based solely upon the fact that your petitioners, the accused, are negroes, and that the man whom they are charged with having murdered was a white man.

From this fact alone they are satisfied that they cannot obtain an impartial trial before a jury exclusively composed of the white race.

They allege that their race have never been allowed the right to serve as jurors, either in civil or criminal cases, in the county of Patrick, in any case, civil or criminal, in which their race have ever been in any way interested up to the present time.

Your petitioners, therefore, pray that said prosecution may be removed to the next circuit court to be held for the United States for the western district of Virginia, in the town of Danville.

9 STATE OF VIRGINIA,
County of Patrick:

This day Burwell Reynolds and Lee Reynolds made oath before me that the facts set forth in the foregoing petition are true to the best of their knowledge and belief.

Given under my hand this 1st day of April, 1878.

A. J. STEDMAN,
Commissioner in Chancery.

Trial of Burwell Reynolds.

The prisoners having elected to be tried separately, Burwell Reynolds was put upon his trial, whereupon a panel of sixteen jurors, selected from the thirty-six summoned by the sheriff, were examined by the court and found free from all legal exceptions and qualified to serve as jurors according to law, and the accused having erased from the said panel four of said jurors—W. T. Thomas, D. J. Morrison, C. J. Martin, John Dehart, D. K. Harroll, J. A. Nolin, S. J. Arrington, W. W. Bouldin, Thos. H. Holt, B. P. Hylton, Wm. Barnard, and C. C. Willis—to whom there was found no objection, being sworn the truth of and upon the premises to speak, having partly heard the evidence, were given in charge of deputy sheriffs R. M. McArthur and H. C. Clark, to whom was administered the usual oath, and the prosecution adjourned over until to-morrow morning 10 o'clock, and the prisoners were remanded to jail.

At another day, to wit, at a circuit court continued and held for the county of Patrick, at the court-house thereof, on the 2d day of April, 1878:

Trial of Burwell Reynolds continued.

Burwell Reynolds, late of the county of Patrick, laborer, who was jointly indicted with one Lee Reynolds, late of the county of Patrick, laborer, was again led to the bar in custody of the jailor of the court, and the jury sworn on yesterday the truth of and upon the premises to speak, came into court in charge of Robert M. McArthur and Henry C. Clark, deputy sheriffs, according to their adjournment, and having fully heard the evidence and arguments of counsel returned to their room to consult on a verdict, and after some time came into court, and not having agreed on a verdict, were given in charge of deputy sheriffs Henry C. Clark and A. W. Houchins, to whom was administered the usual oath, and adjourned over until to-morrow morning 10 o'clock, and the prisoner was remanded to jail.

At another day, to wit, at a circuit court continued and held for the county of Patrick, at the court-house thereof, on the 3d day of April, 1878:

Verdict of guilty. Set aside and new trial.

Burwell Reynolds, late of the county of Patrick, laborer, who stands jointly indicted with Lee Reynolds, late of the county of Patrick, laborer, was again led to the bar in the custody of the jailor of the court, and the jury, sworn over the first day of the term the truth of and upon the premises to speak, appeared in court in charge of H. C. Clark and A. W. Houchins, deputy sheriffs, pursuant to their adjournment, and were sent to their room to consult on a verdict, and after some time came into court, having found the following verdict, to wit, "We, the jury, find the prisoner, Burwell Reynolds, guilty of murder in the first degree, in manner and form as charged in the indictment."

Whereupon, on motion of the said Burwell Reynolds, by counsel, and for reasons appearing to the court, it is ordered that the said verdict be set aside and that a new trial be had upon the said indictment at the next term, and the prisoner is remanded to jail.

At another day, to wit, at a special term of the circuit court for the county of Patrick, held at the court-house thereof, on the 28th day of October, 1878:

Motion for mixed jury, and removal renewed and overruled.

Burwell Reynolds, late of the county of Patrick, laborer, and Lee Reynolds, late of the county of Patrick, laborer, who stand indicted of murder, were led to the bar in custody of the jailor of this court, and the prisoners, the said Burwell Reynolds and the said Lee Reynolds, before the empanneling of the jury for their trial at this term, charged with the murder of Aaron C. Shelton, moved the court to remove said prosecution to the next term of the United States circuit court, to be held in Danville, Virginia, upon the ground set forth in their petition, presented and filed at the April term, 1878, of the court; which motion was again overruled and the prayer of the petition refused.

Burwell's second trial.

The prisoners electing to be tried separately, Burwell Reynolds was put upon his trial; whereupon a panel of sixteen jurors, selected from the twenty-four summoned by the sheriff, were examined by the court and found free from all legal exceptions, and qualified to serve as jurors according to law, and the prisoner, Burwell Reynolds, having erased from the said pannel four of said jurors, B. R. Hall, Wm. M. Frances, Walker Carter, Daniel G. Hatcher, M. E. Lewis, Z. T. Turner, John Tuggle, Richard Cochram, Wilson J. West, B. P. Pace, E. P. Newman, and George R. King, to whom there was found no objection, being sworn, the truth of and upon the premises to speak, having partly heard the evidence, the further prosecution of this cause was continued until to-morrow morning, 10 o'clock; whereupon the jury was given in charge of R. M. McArthur and H. C. Clark, deputy sheriffs, to whom the usual oath was administered, and the prisoners were remanded to jail.

At another day, to wit, at a special term of the circuit court for the county of Patrick, at the court-house thereof, on the 29th day of October, 1878:

Second trial continued.

Burwell Reynolds, late of the county of Patrick, laborer, who was jointly

indicted of murder with one Lee Reynolds, late of the county of
11 Patrick, laborer, was again led to the bar of this court, and the jury sworn on yesterday, the truth of and upon the premises to speak, appeared in court in charge of deputy sheriffs R. M. McArthur and H. C. Clark, pursuant to their adjournment, and having heard the evidence, and partly heard the arguments of counsel, were again given in charge of deputy sheriffs R. M. McArthur and H. C. Clark, to whom the usual oath was administered, and adjourned over until to-morrow morning, 9 o'clock, and the prisoner was remanded to jail.

At another day, to wit, at a special term of the circuit court for the county of Patrick, continued and held at the court-house thereof, on the 30th day of October, 1878:

Second trial of Burwell. Jury adjourned.

Burwell Reynolds, late of the county of Patrick, laborer, who was jointly indicted with Lee Reynolds, late of the county of Patrick, laborer, of murder, was again led to the bar in custody of the jailor of this court, and the jury sworn on the first day of the term, the truth of and upon the premises to speak, and adjourned over on yesterday, again appeared in court in charge of deputy sheriffs McArthur and Clark, pursuant to their adjournment, and after fully hearing the arguments of counsel, were sent to their room to consult of a verdict, and after an absence of some time, came into court, and upon their oath do say that they cannot agree upon a verdict; whereupon the jury was adjourned over until to-morrow morning, 10 o'clock, and given in charge of deputy sheriffs R. M. McArthur and H. C. Clark, to whom the usual oath was administered, who were directed to take them out of court to some convenient room, there to be kept together without communication with any one. And the prisoner, Burwell Reynolds, was remanded to jail.

And now, at this day, to wit, at a special term of the circuit court for the county of Patrick, continued and held at the court-house thereof, on the 31st day of October, 1878:

Second trial of Burwell. Hung jury, &c.

Burwell Reynolds, late of the county of Patrick, laborer, who was, with one Lee Reynolds, late of the county of Patrick, laborer, jointly indicted of murder, was led to the bar in custody of the jailor of this court, and the jury adjourned over on yesterday, came into court in charge of deputy sheriffs R. M. McArthur and H. C. Clark, pursuant to their adjournment, and were sent to their room to consult of a verdict, and after some time was brought into court in custody of the said deputy sheriffs, and on being called and asked if they had agreed upon a verdict, they unanimously replied that they had not; and the court having asked the jury if there was a probability of their agreeing upon a verdict, they unanimously replied there was none; whereupon, by consent, it was ordered that D. G. Hatcher, one of the jurors aforesaid, be withdrawn, and the rest, from rendering their verdict, discharged; and the prisoner is remanded to jail.

At a circuit court continued and held for the county of Patrick, at the court-house thereof, on the 3d day of April, 1878:

12 *Trial of Lee Reynolds.*

Lee Reynolds, late of the county of Patrick, laborer, who stands jointly indicted with Burwell Reynolds for murder, was led to the bar

in custody of the jailor of this court, whereupon a panel of sixteen jurors, selected from the thirty-six summoned by the sheriff, were examined by the court and found free from all legal exceptions, and qualified to serve as jurors according to law, and the prisoner having erased from the panel four of said jurors, C. J. Wright, John W. Toby, Jacob Williams, Wm. F. Murphy, A. J. Handy, T. J. Clark, A. J. Collins, John Barnard, C. G. Bowman, Wm. H. Headon, Green Vaughan, and R. H. Harbour, to whom there was no objection, being sworn, the truth of and upon the premises to speak, having heard the evidence and arguments of counsel, were sent to their room to consult of a verdict, and after some time was brought into court, and not having agreed were adjourned over until to-morrow morning 9 o'clock, and given in charge of deputy sheriffs R. M. McArthur and A. W. Houchins, to whom the usual oath was administered, and the prisoner remanded to jail.

And at another day, to wit, at a circuit court continued and held for the county of Patrick, at the court-house thereof, on the 5th day of April, 1878.

Verdict of guilty as to Lee Reynolds.

Lee Reynolds, late of the county of Patrick, laborer, who stands jointly indicted with Burwell Reynolds, late of the county of Patrick, laborer, of murder, was again led to the bar in custody of the jailor of this court, and the jury sworn on yesterday the truth of and upon the premises to speak, was brought into court in charge of R. M. McArthur and A. W. Houchins, deputy sheriffs, pursuant to their adjournment, and were sent to their room; and after some time were brought into court in charge of deputy sheriff, having found the following verdict, to wit: We, the jury, find the prisoner, Lee Reynolds, guilty of murder in the second degree, in manner and form as charged in the indictment, and ascertain the term of his confinement in the penitentiary to be the period of fifteen years.

Thereupon the prisoner, Lee Reynolds, by counsel, moved the court to set aside the verdict and grant him a new trial, and the court takes time, and the prisoner, Lee Reynolds, is remanded to jail.

And at another day, to wit, at a circuit court continued and held for the county of Patrick, at the court-house thereof, on the 5th day of April, 1878.

Lee Reynolds' motion for a new trial overruled. Sentenced.

Lee Reynolds, late of the county of Patrick, laborer, who was jointly indicted for murder with one Burwell Reynolds, late of the county of Patrick, laborer, was led to the bar in custody of the jailor of this court, and the court having considered the prisoner's motion for a new trial, the same, for reasons appearing to the court, is overruled.

And it being demanded of the prisoner if anything for himself he had or knew to say why the court should not now proceed to pro-
13 nounce judgment against him according to law, and nothing being offered in delay of judgment, it is considered by the court that the said Lee Reynolds be imprisoned in the penitentiary of the commonwealth for the term of fifteen years, to be treated in the manner prescribed by law.

And the sheriff of this county is ordered, as soon as possible after the adjournment of this court, to remove and convey the said Lee Reynolds from the jail of this county to the penitentiary of this commonwealth,

therein to be kept imprisoned and treated in the manner prescribed by law for the term aforesaid.

Memorandum.

On the trial of this prosecution the prisoner by counsel excepted to the opinion of the court and tendered his bill of exceptions, which was signed by the court and ordered to be made a part of the record in this prosecution.

Bill of exceptions and facts.

LEE REYNOLDS.

Be it remembered that at the trial of this cause, after the verdict of the jury, the defendant moved the court to set aside the verdict and award a new trial because it was against the law and the evidence, which motion was overruled, to which opinion of the court the prisoner by counsel excepts and prays the court to certify the facts proved, and the court doth certify the following as all the facts proved on the said trial, to wit:

That A. C. Shelton had become provoked some time preceding the homicide because a younger brother of his had been ducked by the children of a negro school for hallooing school-butter, of which school Lee Reynolds was a member; his brother, Burwell Reynolds, who was jointly indicted with him, took an active part in the ducking; this occurred about two weeks before the homicide. On Tuesday morning preceding the homicide Aaron C. Shelton passed the school-house, in which the school was then in session, and hallooed school-butter, passed on to his work, undisturbed, about four hundred yards to where he was to load his wagon with saw-logs, in which business he was engaged at that time. At recess of the school on the same day, the teacher having left his school in charge of one of the grown and advanced scholars, another brother of Aaron C. Shelton, probably thirteen years of age, approached the school-house at a distance of one hundred and fifty yards and hallooed school-butter. The school children then pursued him until they arrived at where Aaron C. Shelton was standing in the road with a stick in his hand, his uncle being present; some altercation took place between Aaron C. Shelton and the school children, they retreating and he pursuing with a rock and stick, stating that his brother had been ducked a short time before, and he might pass there when he damned please and halloo school-butter; if he was ducked again he would shoot their heart-strings out, and if necessary would follow them into the school-house to do so, and if the school-teacher interfered he would shoot him. Neither Burwell nor Lee Reynolds were present on this occasion, being engaged at this time at work on their father's farm. Shelton, however, approached a sister of Burwell and Lee Reynolds and shook a stick over her head, and asked who it
14 was that called him a rogue; she said nobody, and asked Shelton what all this meant; he replied "one of your brothers ducked one of my little brothers some time ago"; she said her brother did not duck his brother, but only patted a little water on his head; Shelton then said he would pat for him; Shelton then used abusive language to her, which the witness declined to repeat in court.

Mary Burwell, one of the witnesses for the defence, informed Burwell and Lee Reynolds that day of the manner in which Aaron C. Shelton

had abused their sister; late in the evening of the same day Aaron C. Shelton returning home from his work found Burwell and Lee Reynolds trying to roll one of the said logs cut by his uncle, which he was going to carry to the saw mill, out of the road—a road had been cut by the uncle of Aaron C. Shelton by which any one could pass around the logs—Shelton asked Burwell and Lee Reynolds what they were doing; they said they were going to roll the logs out of the road; he cursed them, and told them if they did he would thrash them; Burwell and Lee Reynolds passed on around the log after the threat to the negro school-house before mentioned, which was on their road home, and there stopped, and when Aaron C. Shelton arrived at that place, which was also on his road home, he found them standing on the roadside with a stick and axe; they addressed Shelton, and Lee Reynolds told him they were going back to the log at which he had first found them the next morning, and were going to roll it out of the road, and if he, Shelton, interfered they would shoot him, and if he ran they would make their dogs catch him. This threat was denied by Burwell Reynolds, who was introduced as a witness. Green Shelton, the brother of Aaron C. Shelton, was the witness to this threat. Aaron C. Shelton passed the school-house on Wednesday and Thursday, for the purpose of hauling the saw-logs which had been cut, without any further interference with the school.

On Thursday, about three o'clock, he went to load a log on his wagon, which was lying in the road about a quarter of a mile from the log Burwell and Lee were trying to roll out of the road; when he got in sight of the log he intended loading he saw Burwell and Lee Reynolds standing within ten or fifteen steps of the log; Burwell and Lee Reynolds had been hauling corn from their father's farm, and were returning home by their usual route, and had driven their slide, to which was attached a horse and oxen, outside of the road; as they came up to this point they found a log lying across the road; they passed around the log through the space made by Shelton in removing one of the saw-logs below the road, and stopped where they were first seen by Shelton; they could have seen Shelton at a distance of eighty yards in the road before he reached them, and could have heard him coming about two hundred yards; when Shelton first came in sight with his wagon, his brother Green with him, he came in a fast walk; the track was a single track with a fence on one side and woods on the other, and two such vehicles could not pass each other without one giving the road. Burwell Reynolds, who was driving the slide with some little loading in it, left the main track and drove his slide out of the road down below, and was found with the heads of the ox and horse turned in a direction nearly diagonally with the road; the wagon was found in the road, exactly opposite the rear of the slide; between the wagon and slide, directly below the fore and hind wheels of the wagon, Lee Reynolds was found standing with a gun and stick. Shelton stopped his wagon about
15 fourteen paces from the log which he intended loading; Shelton had hauled one log the day before, and stopped his wagon at a position further from the log than he did on this day. There was a log across the road; when Shelton hauled the first log he could have stopped at that point and loaded, or could have gone further and turned around and then loaded. When Shelton stopped his wagon he asked Lee what he was doing with that stick—there was a conflict of testimony as to whether he said he had a right to carry his stick, or whether he said "if you will get down, God damn you, I will show you." Shelton ordered him to drop the stick, and got out of the wagon. The testimony

conflicted as to whether he dropped the stick, or whether Aaron C. Shelton took it from him. Shelton pursued him, and there was a conflict of testimony as to whether he tried to draw the gun on Shelton or not while he was retreating and Shelton pursuing; Shelton pursued him twelve or fifteen paces and struck him, knocking him over the log, and at that time Burwell Reynolds ran up and stabbed him in the back with a large butcher's knife, which had been used for a tobacco knife.

It was further proved that Lee Reynolds was found immediately afterwards, about fifty yards from the place of the homicide, in the woods with his gun cocked. Burwell fled the county; Lee did not. It was proved that Aaron C. Shelton was a *a* young man, twenty-two years of age, of extraordinary physical development, weighing one hundred and sixty pounds. Lee and Burwell Reynolds, colored boys, respectively eighteen and nineteen years of age.

It was further proven that Burwell and Lee were in the habit of carrying the gun, but not the stick and knife; that Burwell left the place of his business to see what he could pick up, and got the knife off the tier n the barn, the barn being two hundred yards from his business, which, being all the facts proved on the trial, are hereby certified.

WM. M. TREDWAY. [SEAL.]

In the clerk's office of the circuit court for the county of Patrick, at the court-house of said county, in the vacation of said court, on the 17th day of October, 1878, the following mandate was received and entered in the words and figures following:

VIRGINIA:

At a supreme court of appeals held at the court house of Wythe County, in the town of Wytheville, the 30th day of July, 1878.

Judgment of supreme court of appeals.

LEE REYNOLDS, PLAINTIFF IN ERROR,
against
THE COMMONWEALTH, DEFENDANT IN ERROR.

Upon a writ of error to a judgment of the circuit court of Patrick County, rendered on the 5th day of April, 1878, on an indictment of the said plaintiff in error for murder.

This day came again as well the said plaintiff in error, by his counsel, as the Commonwealth, by the attorney-general, and the court having maturely considered the transcript of the record of the judgment
16 aforesaid, and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that the facts certified as proved on the trial did not warrant the jury in finding the plaintiff in error, Lee Reynolds, guilty of the homicide charged in the indictment, and, therefore, the court erred in overruling the motion of said plaintiff in error to set aside the verdict and grant him a new trial, because the verdict was against the evidence.

Therefore it is considered, ordered, and adjudged that the said judgment of the said circuit court be reversed and annulled, the said verdict set aside, and the cause be remanded to the said circuit court for a new trial to be had therein of the said plaintiff in error, Lee Reynolds, upon the said indictment.

Which is ordered to be certified to the said circuit court of the county of Patrick.

A copy. Teste:

JAS. W. CALDWELL, *C. C.*

A copy. Teste:

J. G. RUCKER,
Clerk of Patrick Circuit Court.

At another day, to wit, at a special term of the circuit court for the county of Patrick, held at the court-house thereof, on the 28th day of October, 1878:

Burwell Reynolds, late of the county of Patrick, laborer, and Lee Reynolds, late of the county of Patrick, laborer, who stand indicted of murder, were led to the bar in custody of the jailor of this court; and the said Burwell Reynolds and the said Lee Reynolds, before the empannelling of the jury for their trial at this term, charged with the murder of Aaron C. Shelton, moved the court to remove the said prosecution to the next term of the United States circuit court, to be held in Danville, Virginia, upon the ground set forth in their petition presented and filed at the April term, 1878, of this court; which motion was again overruled and the prayer of the petitioners refused.

The prisoners having elected to be tried separately, Burwell Reynolds was put upon his trial, &c., and the prisoner remanded to jail.

And at another day, to wit, at a special term of the circuit court of Patrick County, continued and held for the county of Patrick, at the court-house thereof, on the 30th day of October, 1878.

Lee Reynolds' second trial.

Lee Reynolds, late of the county of Patrick, laborer, who was jointly indicted of murder with one Burwell Reynolds, late of the county of Patrick, laborer, was again led to the bar in custody of the jailor of this court. Whereupon a pannel of sixteen jurors, selected from those summoned by the sheriff, were examined by the court and found free from all legal exceptions and qualified to serve as jurors according to law; and the prisoner having erased from the panel four of said jurors, L. G. Joyce, W. W. Stoops, C. J. Dalton, W. H. Wimbish, W. C.
17 Lackey, Sparrel Wood, C. W. Plasters, J. P. McGhee, A. J. Dalton, Isham Barnard, McD. Ross, and James H. Rangeley, being sworn the truth of and upon the premises to speak, and having partly heard the evidence, the further prosecution of the cause is concluded until to-morrow morning, 9 o'clock.

Thereupon the jury were given in charge of A. W. Houchins and D. E. Conner, deputy sheriffs, to whom was administered the usual oath, and directed to take the said jury out of court to some convenient room, there to be kept together without communication with any one and to be brought into court at the time aforesaid; and the prisoner is remanded to jail.

And now at this day, to wit, at a special term of the circuit court of Patrick County, continued and held at the court-house thereof, on the 31st day of October, 1878.

Second verdict of guilty of Lee, and sentence.

Lee Reynolds, late of the county of Patrick, laborer, who with

Burwell Reynolds, late of the county of Patrick, laborer, is jointly indicted for murder, was again led to the bar in custody of the jailor of this court; and the jury sworn on yesterday the truth of and upon the premises to speak, and adjourned over until this morning, 9 o'clock, came into court in charge of A. W. Houchins and D. E. Conner, deputy sheriffs, pursuant to their adjournment, and having fully heard the evidence and arguments of counsel, were sent to their room to consult of their verdict, and after some time was brought into court, having found the following verdict, to wit: "We, the jury, find the prisoner, Lee Reynolds, guilty of murder in the second degree, and ascertain the term of his confinement in the penitentiary to be eighteen years."

Whereupon the prisoner moved the court to set aside the verdict and grant him a new trial; which motion being heard the same is overruled; and it being asked of the prisoner if anything for himself he had or knew to say why this court should not now proceed to pronounce judgment against him according to law, and nothing being offered or alleged in delay of judgment, it is considered by the court that the said Lee Reynolds be imprisoned in the penitentiary of this commonwealth for the term of eighteen years; and the sheriff of this county is ordered as soon as possible after the adjournment of this court to remove and convey the said Lee Reynolds from the jail of this county to the penitentiary of this commonwealth, therein to be kept imprisoned and treated in the manner directed by law for the term aforesaid.

Memorandum.

The prisoner, by counsel, excepted to the opinion of the court overruling his motion for a new trial, and tendered his bill, which was signed by the court and ordered to be made a part of the record in this cause.

Bill of exceptions and facts.

Be it remembered that at the trial of this cause, after the verdict of the jury, the defendant moved the court to set aside the verdict and award a new trial, because it was against the law and evidence; which motion was overruled; to which opinion of the court the prisoner, by counsel, excepted, and prays the court to certify the facts proven; and the court doth certify the following as all the facts proven:

That A. C. Shelton had become provoked some time preceding the homicide because a younger brother of his had been ducked by
18 the children of a negro school for hallooing school butter, of which school Lee Reynolds was a member. His brother, Burwell Reynolds, who was jointly indicted with him, took an active part in the ducking; this took place about three weeks before the homicide.

On Tuesday morning before the homicide Aaron C. Shelton passed the school-house in which the school was then in session, hallooed school-butter, and passed on to his work without any disturbance, about four hundred yards to where he was going to load his wagon with saw-logs, in which business he was at that time engaged. At recess of the scool on the same day, the teacher having left his school in charge of one of the grown and advanced scholars, another brother of Aaron C. Shelton, about thirteen years of age, approached the school house at a distance of 150 yards, and hallooed school-butter; the members of the school then pursued him until they arrived at where Aaron C. Shelton was standing in the road with a stick in his hand, his uncle, Asa Tuggle, being present; this place was about four hundred yards from the place

where his saw-logs were, in the direction of the school-house. Aaron C. Shelton having understood some one to call him a rogue, approached the children and asked who called him a rogue, and he was told by one of the school children that it was Puss Reynolds, the sister of Lee and Burwell Reynolds; whereupon some altercation took place between Shelton and the school, in which he abused Puss Reynolds; the school children then turned back to the school-house, Aaron C. Shelton following them with a rock and stick, stating to them that his brother had been ducked a short time before, and he might pass there when he damned pleased and halloo school-butter, and if he was ducked again he would shoot their heart-strings out, and if the teacher interfered he would shoot him, if he had to follow him into the school house; neither Lee nor Burwell Reynolds were present on this occasion, but Aaron C. Shelton shook a stick over the head of Puss Reynolds, a sister of Lee and Burwell Reynolds, and asked her who it was that called him a rogue; she said no one, and asked Shelton what all this meant; he replied, "one of your brothers ducked my little brother some time ago;" she said, her brother "did not duck his brother, but only patted a little water on his head;" Shelton then said he would pat for him, and used abusive language to her, which the witness declined to repeat in court. Mary Burwell, one of the witnesses for the defence, informed Burwell and Lee Reynolds that evening of the manner in which Aaron C. Shelton had abused their sister; late in the evening of the same day Shelton, returning home from his work, found Burwell and Lee Reynolds trying to roll one of the saw-logs that had been cut by his uncle, which he intended carrying to the saw-mill, out of a road down a hill; a road had been cut by the uncle of Shelton by which any one could pass around the log without any inconvenience. Shelton asked Lee Reynolds what he was doing; he said they were going to roll that log out of the road. Shelton cursed them, and told them if they did he would thrash them. Lee and Burwell then passed on around the log in the direction of the school-house, and Shelton stopped at the log about a quarter of an hour, and then went on in the same direction, on his way home. When he got to the school-house he found Lee and Burwell standing on the side of the road, from which they had turned to allow Shelton to pass, with an axe which they used at the school-house. Lee addressed Shelton, and told him that he and Burwell were going back to the log at which he had just found them the next morning, and were going to roll that log out,
and if he interfered with him they would shoot him, and if he ran
19 they would make their dogs catch him.

This threat was denied by Burwell Reynolds, who was introduced as a witness, and stated that Shelton stopped in the road and said he had not forgotten him for ducking my brother. Green Shelton, the brother of Aaron C. Shelton, was the witness to this threat.

Aaron C. Shelton passed the school-house on Wednesday and Thursday hauling his logs without interfering with the school. On Wednesday Shelton received a message, purporting to come from Lee Reynolds, saying that he intended to move that log, and that he had his gun with him, and if he, Shelton, interfered with him he would shoot him. On Wednesday morning, following the past difficulty on the Tuesday before, the prisoner, with his brother, Burwell Reynolds, went back to their farm; on their way they were informed by Asa Tuggle, uncle of the deceased, that Aaron C. Shelton told him to tell them that if he caught them on that road he would beat them. They received the same warning on Thursday morning from the same source. They went on to

their farm, finished their work, and about 3 o'clock p. m. were returning the same road, Burwell driving the slide with some little loading on it; the prisoner was walking in front with a gun and stick. They came to a tree across the road which had been cut by Tuggle since they went down in the morning. It was cut into saw-logs; the second cut had been hauled away; there was one across the road; they moved the log out of the road to pass with the slide, and while in the act of moving, Asa Tuggle, who had cut the log and who was engaged for that purpose by Shelton, said: "Now boys, you have moved that log, and you must take the result." Burwell drove on up the road, which was a single track, about fifteen paces, turned short around a tree into the brush out of the road. The deceased drove his wagon up opposite the rear of the slide in the only track a wagon could have passed, and stopped at least five or ten paces before it was necessary to have stopped in order to load his log, but had stopped further from the log the day before, and the slide could have passed out behind the wagon after it stopped. There was a conflict of testimony at this point as to how the difficulty occurred, whether Lee Reynolds drew the stick upon the deceased, or whether the deceased ordered him to drop it; but that the deceased did get the stick into his possession, and that Lee Reynolds backed and the deceased followed him in a scuffle over the gun for fifteen paces, until the prisoner got to the log; there Shelton struck him with the stick and knocked him over the log; at this moment Burwell Reynolds, who was with the slide, came up from the rear and stabbed him, Shelton, in the back with a large tobacco knife. It was proven that it was eighty yards from the slide to where Shelton was first seen with his wagon by the prisoner, and that the slide could have passed the wagon at other and better places in that distance, which is accordingly certified.

WM. M. TREDWAY. [SEAL.]

STATE OF VIRGINIA,
County of Patrick, ss:

I, L. G. Rucker, clerk of the circuit court for said county of Patrick, in the State of Virginia, do hereby certify that the foregoing is a true transcript of the record and proceedings in a certain prosecution pending in said court against Burwell and Lee Reynolds, on an indictment for murder, with all things touching the same, as fully and wholly as they now exist among the records of my office.

In testimony whereof I hereto set my hand and annex the seal of said court this 9th day of December, 1878.

L. G. RUCKER,
Clerk of Patrick Circuit Court.

20 Supreme Court of the United States, October term, 1878.

Ex parte. In the matter of the Commonwealth of Virginia. No. 4 original. Petitioner.

On consideration of the petition and motion filed in this cause by Mr. James G. Field, of counsel for the petitioner, praying for a rule requiring Alexander Rives, judge of the district court of the United States for the western district of Virginia, to show cause why a writ of mandamus should not issue commanding him to cause to be delivered by the marshall of said district to the jailor of Patrick County, in Virginia, the bodies of Burwell Reynolds and Lee Reynolds, to be dealt with according to the law of the commonwealth of Virginia, it is now here

ordered that the said Alexander Rives, judge of the district court of the United States for the western district of Virginia, show cause, if he can, before this court, on or before the 31st day of March, A. D. 1879, why a writ of mandamus should not issue to him in accordance with the prayer of the petitioner.

10th March, 1879.

21 I, D. W. Middleton, clerk of the Supreme Court of the United States, do hereby certify that the foregoing is a true copy of the order of said Supreme Court, entered in the above-entitled cause, as the same remains upon the official records of the said Supreme Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Supreme Court, at the city of Washington, this 12th day of March, A. D. 1879.

[SEAL OF THE SUPREME COURT OF THE UNITED STATES.]

D. W. MIDDLETON,
Clerk Supreme Court U. S.

Service.

A copy of this citation has been this day delivered to me.
Given under my hand this 17th day of March, 1879.

ALEX'R RIVES,
Dist. Judge of West. District.

22 *Answer of Judge Rives.*

In obedience to the foregoing copy of a citation of the Supreme Court, I beg leave to vouch the record of the cases as now pending in the circuit court of the United States at Danville. It has been hastily and unartificially made up, and includes applications for habeas corpus, which were never acted upon. It is exclusively a case of removal under sect. 641 of the Revised Statutes.

From this record may be gathered the following jurisdictional facts: In April, 1878, the petitioners being denied, as they allege, a legal and impartial jury for their trial, at once filed their petitions in the circuit court of Patrick for removal to the circuit court of the U. S., next ensuing, at Danville, which was to occur on the 15th Nov'r, 1878. These petitions were denied and disregarded by the State court, and the defendants forced into trial. Thereupon Burwell Reynolds was found guilty of murder in the first degree, and a new trial given him; Lee Reynolds, of murder in the second degree, and sentenced to 15 years in the penitentiary, & denied a new trial, to which he ex-

23 cepted, appealed to the supreme court of appeals, and was awarded, on 30th July, a new trial, on the ground "that the facts certified, as proved on the trial, did not warrant the jury in finding the plaintiff in error guilty."

In Oct'r, 1878, these parties were again arraigned for trial before the circuit court of Patrick, renewed their challenges to the venire, and upon their being overruled a second time, pressed their applications for removal to the Federal court, and were a second time refused and forced into trial. In the case of Burwell Reynolds there was a mistrial. Lee Reynolds was again convicted for the longer term of 18 years, refused a new trial, and sentenced for the same.

On the first day of the U. S. circuit court at Danville, namely, on the 15th Nov'r, 1878, which was the first term after the filing of their petitions in the State court, the said parties, by their counsel, filed their petitions in this court, all which resulted in the order of 15th Nov'r, 1878.

I. As to compliance with provisions of sect. 641, upon that depends the jurisdiction of this court. The petitions for removal were filed, and urged on two occasions, April and October, before the State court
24 of Patrick. This was confessedly "before the trial or final hearing of said cause." But in disregard of the act of Congress, the State court, instead of suspending all further proceedings, went on with the trials. How this proceeding is to be treated and regarded is determined by the case of Gordon vs. Longest, 16 Peters, 97, in which your august tribunal expressly recognized the legal duty of "the State court to proceed no further in the cause," and declared "that every step subsequently taken, whether in the same court or in the court of appeals, was coram *non* judice." Still stronger language is used in the opinion of the court in Insurance Company vs. Dunn, 19 Wall., 214, as follows: "The condition prescribed having been complied with, the act of Congress expressly required the State court to proceed no further in the suit. The further proceedings of the common pleas was a clear case of usurped jurisdiction. The illegality was gross." This view obviates the objection that the application for removal came too late.

II. For the constitutionality of this proceeding by removal, I rely, first, upon the long practice thereunder and acquiescence therein; and, secondly, actual adjudications of your honorable court.
25 This remedy, coeval with the judiciary act of 1789; varied as the public exigencies required; assented in 1815, and re-enacted some half a dozen times (1816, 1817, 1833, 1866, 1871, and 1873); sanctioned and approved by great statesmen of different political schools—Mr. Calhoun and President Madison in 1815, and of Mr. Webster and President Jackson in 1833—and for a long succession of years familiar in the practice of the inferior Federal courts, was strongly commended to my approval and compelled my assent and action.

But on this point I invoke pointed authorities: First, Martin vs. Hunter (1 Wh.), where this principle was fully stated and discussed by Justice Story in delivering the opinion of the court in that memorable case. Secondly, the Mayor vs. Cooper (6 Wall., 247), in which Justice Swayne, after arguing the question and stating at large and clearly the grounds of the remedy, concludes with emphasis: "We entertain no doubt of the constitutionality of the jurisdiction given by the acts under which this case has arisen." Lastly, Insurance Company vs. Dunn (19 Wall., 226). From this last I beg leave for facility of reference
26 to make a lengthy extract from the opinion of the court, to which no dissent was expressed.

"Of the constitutionality of this act we entertain no doubt. The question is not an open one in this court. A few remarks will be sufficient to dispose of the subject. The third article of the Constitution declares that the judicial powers of the U. S. shall be vested in one supreme court and in such inferior courts as Congress may from time to time establish; and that it shall extend among other things to 'controversies' between 'citizens of different States.' As regards the inferior courts authorised to be established, Congress may give them such jurisdiction, both original and appellate, within the limits of the Constitution, as it may see fit to confer. How their appellate jurisdiction shall be exercised, is not declared. The whole subject is remitted to the unfettered discretion of Congress. It may be applied to any other inferior Federal and to any State court, where a case is presented which, by reason of the character of the parties or a question involved, falls within the scope of such judicial cognizance. Courts of the State
27 and those of the nation are alike within its sphere, and its exer-

cise may be authorised before or after judgment in the tribunals, over which it is extended. * * * The jurisdiction involves the same principle and rests upon the same foundation with that conferred by the 25th section of the judiciary act of 1789. The constitutionality of that provision has been uniformly sustained by the unanimous judgment of this court whenever the subject has been presented for adjudication. The 12th sect. of the act of 1789, and the 3d sect. of the act of 3 Mar., 1833, relating to revenue officers, present the same question. We are not aware that a doubt of the validity of either has ever been expressed by any Federal court. The acquiescence is now universal."

Approved in Vannevar vs. Bryant (21 W., 41).

III. Section 641 is strictly analogous to the acts thus pronounced constitutional. Its validity is derived from the XIV amendment. I beg leave in this connection to refer to the Slaughter-house cases (16 Wall., 36), for the object of this amendment, namely, "the freedom of the slave race"; the security and firm establishment of that freedom and
28 the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised unlimited dominion over him." The court places under the guarantees of the XIV amendment the rights accruing under its concluding clause, namely, "nor shall any State deny to any person within its jurisdiction the equal protection of the laws"; and I humbly submit, it matters not whether it be done by the State by commission or omission, by law or want of law, by administration of its executive or judicial departments, the mischief is equal and the remedy as much needed.

IV. That a Federal question arising under this amendment was involved in, and a Federal right invaded by the action of the circuit court of Patrick, results from the right of the accused to trial by an impartial jury selected without discrimination of race or color. The challenge to the array was well taken and should have been allowed; and its denial deprived the prisoners of "the equal protection of the laws," and exposed them without reason or excuse to the fatal effects of
29 race and traditionary prejudices. It cannot be that these people shall be entitled to the equal privileges and accommodations of public inns, &c., but may not enjoy the ordinary muniments of personal security in trial by jury, but shall lose the benefit of all the common-law challenges for "unindifferency"—as Ld. Coke expresses it: "So it is, if the sheriff return any one that he be more favourable to the one than to the other, all the array should be quashed." (3 Thomas' Coke, 467.)

Before adverting to the language of the law by means of ascertaining how far it is warranted by the amendment, I beg leave to quote the language of Ch. J. Waite in delivering the opinion of the court in U. S. vs. Reese et al. (92 U. S. Rep'ts, p. 217): "Rights and immunities created by or dependent upon the Constitution of the United States, can be protected by Congress. The form and manner of the protection may be such as Congress in the legitimate exercise of its legislative discretion shall provide. These may be varied to meet the necessities of the particular right to be protected."

By this test, I submit the remedy of removal is justified for "any person who is denied or cannot enforce in the judicial tribunals of
30, 31 the State, or in the part of the State where such suit is prosecuted any right secured to him by any law providing for the equal rights of all citizens, or of all persons within the jurisdiction of the United States."

The record attests that these parties were denied trial by a jury, legal under the laws of the State, and without discrimination of race;

that their challenge to the array was improperly overruled, & that the results of two trials, had in defiance of the act of Congress, and one ending in a verdict, against the opinion of the supreme court of the State on the facts, shewed that they could expect no relief save before a Federal court.

With these convictions and these reasons and these authorities, while holding the circuit court at Danville in the absence of the circuit judge and the Chief Justice, who is allotted to this circuit, I rendered the judgment complained of.

The question whether a mandamus lies in such a case, is respectfully submitted to the court under its own well-known and reiterated decisions.

Respectfully submitted.

ALEX. RIVES,
Dist. Judge for the Western Dist. of Va.

17 MAR. '79.

32 Pleas before the judges of the circuit court of the United States of America for the fourth circuit and the western district of Virginia, at Danville, on the 25th day of February, in the year of our Lord one thousand eight hundred and seventy-nine.

Be it remembered that heretofore, to wit, at a circuit court of the United States of America for the fourth circuit and the western district of Virginia, continued and held at Danville, on the 20th day of November, in the year of our Lord one thousand eight hundred and seventy-eight, Burwell and Lee Reynolds, by their counsel, submitted to the court a petition by them presented to the judge of the circuit court for the county of Patrick for the removal of the prosecutions against them into this court, which petition is a part of the record which said petitioners have forwarded to the clerk of the said circuit court of Patrick, and now offer to file in this court, praying that said prosecutions may be here docketed and proceeded with here. The court being of opinion that said petitioners have been denied such a trial as is secured to them by the laws of this State by competent jurors, without distinction of race or color, doth direct said cause, upon the petition aforesaid, to be docketed in this court for trial; and the clerk is hereby authorized forthwith to issue a writ of habeas corpus, cum causa, to the marshal of this district to take the bodies of said defendants into his custody,

33 to be dealt with according to law and the orders of this court, and that the clerk of this court, in the vacation thereof, direct to said marshal a writ of venire facias for twenty-five jurors, qualified as such by the laws of this State, without distinction of race or color, to attend on the first day of the next term for the trial of said cases at the bar of this court.

To the honorable Alexander Rives, judge of the United States district, for the western district of Virginia:

The petition of Burwell Reynolds respectfully shows that your petitioner is confined unjustly, as he apprehends, in the jail of Patrick County, Virginia, for some criminal or supposed criminal matter, as appears by a copy of the indictment and other proceedings had in the circuit court for said county, hereto annexed. To be relieved from which confinement your petitioner now applies, praying that a writ of habeas corpus may issue, so that he may be brought before your honor to do, submit to, and receive that the laws may require.

his
BURWELL + REYNOLDS.
mark.

STATE OF VIRGINIA,
Patrick County:

The above-named Burwell Reynolds made oath before me, a justice of the peace for said county, that the facts set forth in the above petition are true to the best of his knowledge and belief.

Given my hand Nov. 5th, 1878.

JOS. BISHOP, *J. P.*

34 To the honorable Alexander Rives, judge of the United States court for the western district of Virginia:

The petition of Lee Reynolds respectfully shows: That your petitioner is confined unjustly, as he apprehends, in the jail of Patrick County, Virginia, for some criminal or supposed criminal matter, as appears by a copy of the indictment and other proceedings had in the circuit court for said county, hereto annexed. To be relieved from which imprisonment your petitioner now applies, praying that a writ of habeas corpus may be issued, so that he may be brought before your honor to do, submit to, and receive that the law may require.

his
LEE + REYNOLDS.
mark.

STATE OF VIRGINIA,
Patrick County:

Lee Reynolds, above named, made oath before me, a justice of the peace for the said county, that the facts set forth in the above petition are true to the best of his knowledge and belief.

JOS. BISHOP, *J. P.*

At a circuit court held for the county of Patrick at the court-house thereof, on the first day of April, 1878, Burwell Reynolds and Lee Reynolds, late of the county of Patrick, labourers, who stand jointly indicted for murder, was led to the bar in custody of the jailor of this court; whereupon the accused, by counsel, moves the court the venire in the cause, composed entirely *intirely* of the white race, be so modi-
35 fied as to allow one-third of the venire to be composed of their race, they being colored, which motion was overruled, upon the ground that the court had no authority to change the venire, it appearing that the said venire had been regularly drawn from the jury-box according to law. The accused, by counsel, then appealed to the attorney for the Commonwealth and to the counsel assisting in the prosecution that, as the ballots in the jury-box were entirely of the white race, they, the said attorney for the Commonwealth and the feed counsel for the prosecution, to allow them, the accused, a venire to be composed of one-third of their own race, they, the accused, waiving all objections to the illegality of so constituting the same, which the attorney for the Commonwealth and the feed counsel assisting in the prosecution refused.

Thereupon the accused, by counsel, filed their petition, verified by their affidavits, praying that this prosecution may be removed to the next circuit court to be held for the United States for the western district of Virginia, in the town of Danville, which prayer was denied by the court.

Whereupon the accused, in the county court, having elected to be tried separately, plead not guilty to the indictment, and were remanded for trial before this court. On their demand Burwell Reynolds was put upon his trial. Thereupon a panel of sixteen jurors, selected from the

thirty-six drawn by the clerk and summoned by the sheriff, were examined by the court and found free from all legal exceptions and qualified to serve as jurors according to law, and the accused having erased from said panel four of said jurors, W. T. Thomas, D. J. Morrison, C. J.
36 Mather, John Dehart, D. K. Harroll, J. A. Nolin, S. J. Arrington, W. W. Bowling, T. H. Holt, B. P. Hylton, Wm. Barnard, and C. C. Willis, to whom there was no objection, being sworn the truth of and upon the premises to speak, having partly heard the evidence, were given in charge of R. M. McArthur and H. C. Clark to be kept together, to whom the usual oath was administered, and the prosecution is continued until to-morrow morning, ten o'clock, and the prisoner is remanded to jail.

And at another day, to wit, at a circuit court continued and held for the county of Patrick, at the court-house thereof, on the 2nd day of April, 1878, Burwell Reynolds, late of the county of Patrick, labourer, was again led to the bar by the jailor of this court, and the jury sworn on yesterday the truth of and upon the premises to speak appeared in court in charge of R. M. McArthur and Henry C. Clark, deputies for Isaac N. Akers, sheriff, pursuant to their adjournment, and having fully heard the evidence and arguments of counsel, retired to their rooms to consult on a verdict, and after some time came into court, and not having agreed on a verdict were given in charge of H. C. Clark and A. W. Houchins, deputies for I. N. Akers, sheriff of said county, to whom was administered the usual oath, and adjourned over until to-morrow morning, ten o'clock, and the prisoner is remanded to jail.

And at another day of the same term, to wit, at a circuit court continued and held for the county of Patrick, at the court-house
37 thereof, on the 3d day of April, 1878, Burwell Reynolds, late of the county of Patrick, labourer, was again led to the bar in custody of the jailer of this court, and the jury sworn on the first day of the term the truth of and upon the premises to speak appeared in court in charge of H. C. Clark, and A. W. Houchings, deputies for I. N. Akers, sheriff, pursuant to their adjournment, and were sent to their room to consult on a verdict, and after some time came into court, having found the following verdict, to wit:

"We, the jury, find the prisoner, Burwell Reynolds, guilty of murder in the first degree, in manner and form as charged in the indictment."

Whereupon, on motion of the said Burwell Reynolds, by counsel, and for reasons appearing to the court, it is ordered that the said verdict be set aside and that a new trial be had upon said indictment, and the prisoner is remanded to jail.

The petition filed in this cause is in the words and figures following, to wit:

To the judge of the circuit court of Patrick:

Your petitioners, Lee Reynolds and Burwell Reynolds, represent that there is now pending against them a criminal prosecution in the circuit court of Patrick, in which they are charged with the murder of one Aaron Shelton.

Your petitioners are negroes, aged respectively 17 and 19; that the man whom they are charged with having murdered was a white man. Your petitioners allege that the right secured to them by the law providing for the equal civil rights of citizens of the United States
38 is denied to them in the judicial tribunal of the county of Patrick, of which county they are natives and citizens.

They allege that by the law of Virginia, that all *mail* citizens, twenty-one years of age, and not over sixty, who are entitled to vote and hold office under the constitution and laws of this State, shall be liable to serve as jurors; this law allows the right as well as requires the duty of the race to which they belong to serve as jurors; yet the grand jury who has made the indictment against them, as well as the venire summoned to try them, are exclusively composed of the white race.

They have applied through their counsel to your honor, the judge of said court, and also the prosecuting attorney of said county, as well as the fee'd counsel employed to assist in the prosecution, that a portion of the venire by which they are to be tried in said circuit court of Patrick should be, at least in part, composed of competent jurors of their own race and color; this right has been refused them.

They allege that a strong prejudice exist' in the community of said county against them independant of the merits of the case, and based solely upon the fact that your petitioners, the accused, are negroes, and that the man whom they are charged with having murdered was a white man; from this fact alone they are satisfied that they cannot obtain an impartial trial before a jury composed of the white race. They further state that their race have never been allowed the right to serve as jurors, either in civil or criminal cases in the county of Patrick, in any case civil or criminal in which their race have ever been in any way interested up to the present time.

Your petitioners therefore pray that said prosecution may be
39 removed to the next circuit court to be held for the United States for the western district of Virginia in the town of Danville.

STATE OF VIRGINIA,
County of Patrick:

This day Burwell Reynolds and Lee Reynolds made oath before me that the facts set forth in the foregoing petition are true to the best of their knowledge and belief.

Given under my hand this 1st day of April, 1878.

A. J. STEDMAN,
Com'r in Chancery.

PATRICK COUNTY, *wit:*

I, L. G. Rucker, clerk of the circuit court for the county aforesaid, do certify that the foregoing is a true copy of the proceedings had in the circuit court of said county against Burwell Reynolds, upon a joint indictment against said Burwell Reynolds and one Lee Reynolds, for the murder of Aaron C. Shelton, as fully as the same appear upon the record of said court.

Given under my hand this 3rd day of June, 1878.

L. G. RUCKER, *Clerk.*

40 VIRGINIA:

At a special term of the circuit court held for the county of Patrick, at the court-house thereof, on the 28th day of October, 1878. Present, William M. Tredway, esqr., judge. Burwell Reynolds, late of the county of Patrick, and Lee Reynolds, late of the county of Patrick, who stand indicted of murder, were led to the bar in custody of the jailor of this court, and thereupon the prisoners, the said Burwell Reynolds and the said Lee Reynolds, before the impaneling of the jury for their trial at this term for the murder of Aaron C.

Shelton, move the court to remove the said prosecution to the next term of the United States circuit court, to be held in Danville, Virginia, upon the ground set forth in their petition presented and filed at the April term, 1878, of this court, which motion was again overruled, and the prayer of the petitioners refused.

The prisoners elected to be tried separately.

Burwell Reynolds was put upon his trial, whereupon a panel of sixteen jurors selected from the twenty-four summoned by the sheriff, were examined by the court and found free from all legal exceptions, and qualified to serve as jurors according to law, and the prisoner Burwell Reynolds having erased from the panel four of said jurors, the remaining twelve, to wit: B. R. Hall, Wm. M. Frances, Walker Carter, D. G. Hatcher, M. E. Lewis, Z. T. Turner, John Tuggle, Richard Cockrane, W. J. West, B. P. Pace, E. T. Newman, and George R. King, to whom there was found no objection, were sworn the truth of and upon the premises to speak, and having partly heard the evidence, the further prosecution of the cause was continued until to-morrow morning 10 o'clock,
41 and the jury given in charge R. M. McArthur and Henry C. Clark, to whom was administered the usual oath, to be taken to some convenient room, and there kept together without communication with any person.

And the prisoners were remanded to jail.

And at another day, to wit, at a special term of the circuit court, for the county of Patrick, continued and held at the court house thereof, on the 29th day of October, 1878, Burwell Reynolds, late of the county of Patrick, who was jointly indicted of murder with one Lee Reynolds, late of the county of Patrick, was again led to the bar in custody of the jailor of this court, and the jury sworn on yesterday, the truth of and upon the premises to speak, was brought into court in charge of deputy sheriffs R. M. McAllister and H. C. Clark, pursuant to their adjournment, and having heard the evidence, and partly heard the arguments of counsel, were again given in charge of deputy sheriffs R. M. McArthur and Henry C. Clark, to whom was administered the usual oath, and adjourned over until to-morrow morning 9 o'clock.

And the prisoner is remanded to jail.

And at another day, to wit, at a special term of the circuit court for the county of Patrick, continued and held at the court-house thereof, on the 30th day of October, 1878, Burwell Reynolds, late of the county of Patrick, who was jointly indicted with one Lee Reynolds, late of the county of Patrick, of murder, was again led to the bar in
42 *in* custody of the jailor of this court, and the jury sworn on the first day of the term, the truth of and upon the premises to speak, and adjourned over on yesterday, again appeared in court in charge of deputy sheriffs R. M. McArthur and H. C. Clark, pursuant to their adjournment, and after hearing the arguments of counsel, were sent to their room to consult of a verdict, and after an absence of some time was brought into court, and on being asked if they had agreed on a verdict, upon their oath do say that they cannot agree upon a verdict; whereupon they were adjourned over until to-morrow morning ten o'clock, and given in charge of deputy sheriffs R. M. McArthur and H. C. Clark, to whom the usual oath was administered; who was directed to take them out of the court to some convenient room, and there to be kept together without communication with any one; and the prisoner Burwell Reynolds was remanded to jail.

And at another day, to wit, at a special term of the circuit court for the county of Patrick, continued and held at the court-house thereof, on the 31st day of October, 1878, Burwell Reynolds, late of the county of Patrick, who, with one Lee Reynolds, late of the county of Patrick, was jointly indicted of murder, was again led to the bar, in custody of the jailor of this court, and the jury adjourned over on yesterday came into court in charge of R. M. McArthur and H. C. Clark, deputy sheriffs, pursuant to their adjournment, and were sent to their room to con-
43 sult, and after some time was brought into court, and on being called and asked if they had agreed on a verdict, they replied they had not; and the court having asked the jury if there was no chance or probability of their agreeing upon a verdict, they unanimously replied that there was none; whereupon, with the consent of the prisoner, D. G. Hatcher, one of the aforesaid jurors, was withdrawn, and the rest from rendering their verdict discharged, and the prosecution continued until the next term, for a new trial to be had therein.

And the prisoner Burwell Reynolds was remanded to jail.

At a special term of the circuit court for the county of Patrick, continued and held at the court-house thereof on the 30th day of October, 1878, Lee Reynolds, late of the county of Patrick, who was jointly indicted with one Burwell Reynolds, late of the county of Patrick, of murder, was again led to the bar, in custody of the jailor of this court; whereupon a panel of sixteen jurors, selected from those summoned by the sheriff, were examined by the court and found free from all legal exceptions, and qualified to serve as jurors according to law, and the prisoner having erased from the panel four of said jurors, the following twelve, to wit, L. G. Joyce, W. W. Stoops, C. J. Dalton, W. H. Wimbish, W. C. Lacky, Sparrel Wood, C. W. Plasters, J. P. McGee, A. J. Dalton, Isham Barnard, McD. Ross, and James H. Rangely were sworn the truth of and upon the premises to speak, and having partly heard the evidence, the further prosecution of the cause was continued until to-morrow morning 9 o'clock.

44 Thereupon the jury was given in charge of A. W. Hutchings and D. E. Comer, deputy sheriffs, to whom was administered the usual oath, and who was directed to take them out of court to some convenient room, there to be kept together, without communication to or with any one.

And the prisoner, Lee Reynolds, was remanded to jail.

And now at this day, to wit, at a special term of the circuit court for the county of Patrick, continued and held at the court-house thereof on the 31st day of October, 1878, Lee Reynolds, late of the county of Patrick, who was, with one Burwell Reynolds, late of the county of Patrick, jointly indicted of murder, was again led to the bar in custody of the jailor of this court, and the jury, sworn on yesterday, the truth of and upon the premises to speak, and adjourned over until this morning, came into court, pursuant to their adjournment, and having partly heard the evidence and arguments of counsel, were sent to their room to consult of a verdict, and after some time was brought into court, having found the following, to wit: "We, the jury, find the prisoner, Lee Reynolds, guilty of murder in the second degree, and ascertain the term of his confinement in the penitentiary to be eighteen years." Whereupon the prisoner moved the court to set aside the verdict and grant him a new trial. The motion being heard, the same for satisfactory reasons is overruled. Whereupon it being asked of the prisoner if anything for

45 himself he had or knew to say why the court should not now proceed to pronounce judgment against him according to law, and nothing being offered or alleged in delay of judgment, it is considered by the court that the said Lee Reynolds be imprisoned in the penitentiary of this commonwealth for the term of 18 years.

And the sheriff of this county is ordered, as soon as possible after the adjournment of this court, to remove and convey the said Lee Reynolds from the jail of this court to the penitentiary of this commonwealth, therein to be kept imprisoned and treated in the manner directed by law for the term aforesaid.

PATRICK COUNTY, *to wit:*

I, L. G. Rucher, clerk of the circuit court for the county of Patrick, do hereby certify that the foregoing is a true transcript from the records of my court, and embraces the record of the trial of Burwell Reynolds and Lee Reynolds, tried at the October special term of said court for murder.

Given under my hand this 4th day of November, 1878.

L. G. RUCHER, *Clerk.*

Opinion of Judge Rives in ex parte Burwell and Lee Reynolds.

November term, 1878, of U. S. circuit court at Danville.

On the power and right of removal of crim. prosecutions for State offences, under sections 641–2 Rev'd Stat's, where the prisoners,
46 being colored, are denied equal rights, from a failure or refusal to allow them any jurors of their own race or color on the panel for their trial.

I am aware that this application presents questions of novelty, gravity, and delicacy. The law on which it is founded is not familiar to the bar generally, and far less so to the public at large. Hence, any action under it is liable to be misunderstood and misrepresented; and thus to give rise to undue excitement, disquiet, and popular disturbance. This particular enactment has not been authoritatively construed, though some light is thrown upon it by decisions of the Supreme Court upon kindred parts of the same general legislation for the enforcement of civil rights under the late amendments of the Constitution. Anything like a conflict of jurisdiction between the State and Federal courts ought to be avoided whenever it is possible; and it is to be presumed that each respective set of tribunals will be animated by an equal and common desire to obviate all such interference. Both judicatories are alike subjected by Article VI of the Constitution of the United States to that Constitution and laws of Congress made in pursuance thereof, and it is expressly added that "the judges in every State shall be bound thereby, anything in the constitution or laws of the State to the contrary notwithstanding." Even where unavoidable, such conflict is apt to disturb the harmony and interrupt the peaceful action of the two governments; to shock the just sensibility and excite unduly the apprehensions of the public.

In the consideration, therefore of this case, I felt I would best
47 consult my own peace and popular repose if I could find the means thereby of reconciling my duty with a denial of this petition. But, of course, paramount to such considerations was my wish and determination alike to execute the laws of Congress in behalf even

of the humblest, so as to ensure the equal protection of all citizens, as guaranteed by the XIV amendment of the Constitution.

It is only necessary to state such facts of this application as are necessary to the presentation and clear understanding of the question I am to decide. The immediate and last petition here is for a habeas corpus. Upon examining the record upon which it is predicated, it will be seen that the parties presented their petitions to the State court before a trial of their cases for a removal of them to this court. Before doing so, however, their counsel asked of the State judge to so reconstruct the jury as to place some of their race and color, qualified according to the laws of the State, upon the venire, on the ground that they could not expect an impartial trial by a jury wholly alien to them in race and color. They were denied this right; and, in consequence thereof, and upon the allegation of this denial of the equal protection of the laws, they then submitted to the State court their petition for removal, and now, on the first day of this term, filed the same in this court, asking the cause to be docketed here. Taking the whole case together, I regard it as a petition for removal which necessarily
48 leads to the remedy by habeas corpus, which they invoked by the more recent petition submitted to me in vacation, the hearing of which I adjourned to this term. After trial and sentence of one of the petitioners, on the mere statement thereof it would seem the period had passed for removal.

In the case of the Justices vs. Murray (9 Wall., 274), it was properly held that the 5th section of the act of Congress of March 3, 1863, allowing a removal by writ of error and other process to the circuit court within six months after rendition of judgment was unconstitutional, because contrary to the VIIth amendment of the Constitution of the United States, declaring that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according the rules of the common law. This decision was rendered in December, 1869. The act passed April 9th, 1866, entitled "An act to protect all persons in the United States in their civil rights and furnish the means of their protection," provided for a removal to federal courts in compliance with this act, thus subsequently pronounced unconstitutional in this particular. Hence, as the law now stands, the petition must be filed in the State court before the trial or final hearing. This was done in this case, but the court overruled the petition and proceeded to the trial, notwithstanding the explicit declaration in section 641, that "upon the filing of such petition all further proceedings in the State courts shall cease and shall not be resumed, except as hereinafter provided."

What effect, if any, shall be given to a trial thus had may be best determined by the language and reason of the law. I, therefore, quote the two sections, 641–2, omiting therefrom only the terms embrac-
49 ing the case of officers, civil or military, or other person, for any arrest or imprisonment, or other trespasses or wrongs made or committed by virtue of and under color of authority derived from any law providing for equal rights as aforesaid. By this omission the application of the law to the case at bar will be more clearly and compactly seen. For future comments it is proper to give the two sections, with this disembarrassment of other matter, at length and verbatim.

(Sec. 641 Rev'd Stat's, U. S. Ed., 1878, p. 115.)

"When any civil or criminal prosecution is commenced in any State court for any cause whatever against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit is prosecuted, any right secured to him by any

45 himself he had or knew to say why the court should not now proceed to pronounce judgment against him according to law, and nothing being offered or alleged in delay of judgment, it is considered by the court that the said Lee Reynolds be imprisoned in the penitentiary of this commonwealth for the term of 18 years.

And the sheriff of this county is ordered, as soon as possible after the adjournment of this court, to remove and convey the said Lee Reynolds from the jail of this court to the penitentiary of this commonwealth, therein to be kept imprisoned and treated in the manner directed by law for the term aforesaid.

PATRICK COUNTY, *to wit:*

I, L. G. Rucher, clerk of the circuit court for the county of Patrick, do hereby certify that the foregoing is a true transcript from the records of my court, and embraces the record of the trial of Burwell Reynolds and Lee Reynolds, tried at the October special term of said court for murder.

Given under my hand this 4th day of November, 1878.

L. G. RUCHER, *Clerk.*

Opinion of Judge Rives in ex parte Burwell and Lee Reynolds.

November term, 1878, of U. S. circuit court at Danville.

On the power and right of removal of crim. prosecutions for State offences, under sections 641–2 Rev'd Stat's, where the prisoners,
46 being colored, are denied equal rights, from a failure or refusal to allow them any jurors of their own race or color on the panel for their trial.

I am aware that this application presents questions of novelty, gravity, and delicacy. The law on which it is founded is not familiar to the bar generally, and far less so to the public at large. Hence, any action under it is liable to be misunderstood and misrepresented; and thus to give rise to undue excitement, disquiet, and popular disturbance. This particular enactment has not been authoratively construed, though some light is thrown upon it by decisions of the Supreme Court upon kindred parts of the same general legislation for the enforcement of civil rights under the late amendments of the Constitution. Anything like a conflict of jurisdiction between the State and Federal courts ought to be avoided whenever it is possible; and it is to be presumed that each respective set of tribunals will be animated by an equal and common desire to obviate all such interference. Both judicatories are alike subjected by Article VI of the Constitution of the United States to that Constitution and laws of Congress made in pursuance thereof, and it is expressly added that "the judges in every State shall be bound thereby, anything in the constitution or laws of the State to the contrary notwithstanding." Even where unavoidable, such conflict is apt to disturb the harmony and interrupt the peaceful action of the two governments; to shock the just sensibility and excite unduly the apprehensions of the public.

In the consideration, therefore of this case, I felt I would best
47 consult my own peace and popular repose if I could find the means thereby of reconciling my duty with a denial of this petition. But, of course, paramount to such considerations was my wish and determination alike to execute the laws of Congress in behalf even

of the humblest, so as to ensure the equal protection of all citizens, as guaranteed by the XIV amendment of the Constitution.

It is only necessary to state such facts of this application as are necessary to the presentation and clear understanding of the question I am to decide. The immediate and last petition here is for a habeas corpus. Upon examining the record upon which it is predicated, it will be seen that the parties presented their petitions to the State court before a trial of their cases for a removal of them to this court. Before doing so, however, their counsel asked of the State judge to so reconstruct the jury as to place some of their race and color, qualified according to the laws of the State, upon the venire, on the ground that they could not expect an impartial trial by a jury wholly alien to them in race and color. They were denied this right; and, in consequence thereof, and upon the allegation of this denial of the equal protection of the laws, they then submitted to the State court their petition for removal, and now, on the first day of this term, filed the same in this court, asking the cause to be docketed here. Taking the whole case together, I regard it as a petition for removal which necessarily
4 leads to the remedy by habeas corpus, which they invoked by the more recent petition submitted to me in vacation, the hearing of which I adjourned to this term. After trial and sentence of one of the petitioners, on the mere statement thereof it would seem the period had passed for removal.

In the case of the Justices vs. Murray (9 Wall., 274), it was properly held that the 5th section of the act of Congress of March 3, 1863, allowing a removal by writ of error and other process to the circuit court within six months after rendition of judgment was unconstitutional, because contrary to the VIIth amendment of the Constitution of the United States, declaring that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according the rules of the common law. This decision was rendered in December, 1869. The act passed April 9th, 1866, entitled "An act to protect all persons in the United States in their civil rights and furnish the means of their protection," provided for a removal to federal courts in compliance with this act, thus subsequently pronounced unconstitutional in this particular. Hence, as the law now stands, the petition must be filed in the State court before the trial or final hearing. This was done in this case, but the court overruled the petition and proceeded to the trial, notwithstanding the explicit declaration in section 641, that "upon the filing of such petition all further proceedings in the State courts shall cease and shall not be resumed, except as hereinafter provided."

What effect, if any, shall be given to a trial thus had may be best determined by the language and reason of the law. I, therefore, quote the two sections, 641–2, omiting therefrom only the terms embrac-
49 ing the case of officers, civil or military, or other person, for any arrest or imprisonment, or other trespasses or wrongs made or committed by virtue of and under color of authority derived from any law providing for equal rights as aforesaid. By this omission the application of the law to the case at bar will be more clearly and compactly seen. For future comments it is proper to give the two sections, with this disembarrassment of other matter, at length and verbatim.

(Sec. 641 Rev'd Stat's, U. S. Ed., 1878, p. 115.)

"When any civil or criminal prosecution is commenced in any State court for any cause whatever against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit is prosecuted, any right secured to him by any

law providing for the equal rights of all citizens or of all persons within the jurisdiction of the United States; * * * * * such suit or prosecution may, upon the petition of such defendant filed in the said State court at any time before the trial or final hearing of said cause, stating the facts, and verified by affidavit, be removed for trial into the next circuit court to be held in the district where it is pending. Upon the filing of said petition all further proceedings in the State courts shall cease, and shall not be resumed, except as hereafter provided. But all bail and other security given in such suit or prosecution shall continue in like force and effect as if the same had proceeded to final judgment and execution in the State court. It shall be the duty of the clerk of the state court to furnish such defendant petitioning for a
50 removal, copies of said process against him, and of all pleadings, depositions, testimony, and other proceedings in the case. If such copies are filed by said petitioner in the circuit court on the first day of its session, the cause shall proceed therein in the same manner as if it had been brought there by original process, and if the said clerk refuses or neglects to furnish such copies, the petitioner may thereupon docket the same in the circuit court, and the said court shall then have jurisdiction therein, and may, upon proof of such refusal or neglect of said clerk, and upon reasonable notice to the plaintiff, require the plaintiff to file a declaration, petition, or complaint in the cause, and in case of his default may order a non suit and dismiss the case at the cost of the plaintiff, and such dismissal shall be a bar to any further suit touching the matter in controversy. But if without such refusal or neglect of said clerk to furnish such copies, and proof thereof, the petitioner for removal fails to file copies in the circuit court as herein provided, as certificate under the seal of the circuit court, stating such failure shall be given, and upon the production thereof the said State court the cause shall proceed therein as if no petition for a removal had been filed."

SEC. 642. Id., p. 116. "When all the acts necessary for the removal of any suit or prosecution, as provided in the preceding section, have been performed, and the defendant petitioning for such removal is in actual custody on process issued by said State court, it shall be the duty of the clerk of said circuit court to issue a writ of habeas
51 corpus cum causa, and of the marshal by virtue of such writ to take the body of the defendant in his custody, to be dealt with in said circuit court according to law, and the orders of said court, or in vacation of any judge thereof; and the marshal shall file with or deliver to the clerk of said State court, it shall be the duty of the clerk of said circuit court to issue a writ of habeas corpus cum causa, and of the marshal, by virtue of such writ to take the body of the defendant in his custody, to be dealt with in said circuit court according to law, and the orders of said court, or in vacation of any judge thereof; and the marshal shall file with or deliver to the clerk of said State court a duplicate copy of said writ."

The only warrant for these enactments is to be found, if at all, in Article XIV of the late amendments to the Constitution. If they do not come within the designation by section 5 of the article of "legislation appropriate to the enforcement of the provisions of this article," then they are reprobated as void under the decisions of the Supreme Court in the case of U. S. vs. Reese al., (92 U. S. Rept's, p. 214,) and U. S. vs. Cruikshank, (Id. p. 542.)

Let us, therefore, explore the language and scope of the first section of this article. It is as follows: "Any persons, born or naturalized

within the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make and enforce any law which shall abridge the privilege or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due pro-
52 cess of law, nor to deny to any person within its jurisdiction the equal protection of the law."

It is conceded that this inhibition applies exclusively to the State But that term presents a complex idea. A State is a sort of trinity; it exists, acts, and speaks in three capacities—legislative, executive, and judicial. What is forbidden to it in one capacity is forbidden to it in each and all. It may not infringe this article by legislation, but it may equally do so by its courts, or its executive authorities. Hence, it seems to me it is in strict pursuance of this article to base the intervention of the Federal courts on the inability to enforce in the judicial tribunals of the State or in some parts thereof the equal civil rights secured by this article. The mischief is the same, whether the deprivation proceeds from the law, the courts, or the executive. It is equally attributable to the State; the laws of the State may be all conformable to the requirements of this article, but its infraction may rest with the courts, or executive authorities of the counties.

The amendment, to be potential and attain its end, should be enforced as these enactments purport, by providing a remedy for the direliction, in whatever quarter it may appear. Hence, to find a casus for the application of this law of Federal intervention under the theory of this article, we are not restricted to the action of the legislature alone; it clearly contemplates the failure of executive or judicial remedies for the enforcement of these equal civil rights. But it is objected that this article is silent as to the right or mode of trial of colored persons accused of State offences. A constitutional provision is necessarily gen-
53 eral and never descends to detail. It merely ordains equality of rights and protection to all. In the time of slavery, these persons were not entitled to trial by jury; they were tried by a court of five justices. Will it be pretended that that mode of trial could now be reconciled to this amendment because silent on this point? It is sufficient to answer that it guarantees to them the equal protection of the laws, which obviously includes the same mode of trial and the same measure of punishment.

In the same mere technical spirit, it is said there is nothing in this article giving colored persons, or indicating for their trial, mixed jury. But inasmuch as a major proposition in logic includes the minor premise, this equal protection can only be had in criminal trials through juries composed of the same persons, and constituted in the same mode, as well for negroes as for whites. If a mixed jury is allowable by the State law in all cases, for a stronger reason is it right and permissible for the trial of a negro? In the latter case a white panel cannot be imputed to chance, it must be taken as the result of design in derogation of his right to a fair jury for his trial.

The State law is not in fault here. Under it all voters are competent jurors, the selection devolving on the county judge, so that no discrimination is made by it on account of color or race. I have endeavored to follow as closely as practicable this State law in the selection of my juries at this bar. What would be thought or said of me if I, against remonstrance, empannelled negroes exclusively to try white men for offences; and yet the same anomaly and injustice exists in try-
54 ing negroes by juries of white men alone.

The State law, as well as this amendment, guarantees to this lately enfranchised class the same sort of juries for their trial as should reasonably follow from the deliberate omission in the law of any discrimination on account of color or race. The demand, therefore, to reconstruct the venire under the direction of the presiding judge, so as to allow some representation of the prisoner's race upon it, was, as it seems to me, in conformity with the law of the State, and the just concession to the spirit of this amendment. This demand is to be taken as a challenge to the array on the ground that whereas the State law ordains what is called mixed juries, that is, of all persons qualified as voters, without distinction of race or color, in this case the selection has been so made, whether by design or accident it matters not, as to include only whites, to the manifest hazard of the prisoner. The converse of the proposition, as I have suggested, namely, the rightfulness of overruling the challenge of a white person to a panel of negroes, would not, I am sure, be contended for in any quarter. It is plainly the law, and not any construction of mine, which, in case of challenge, gives the accused, whatever may be his race or color, the privilege of being tried by such jurors as the State law admits. In every view I can take of it, the denial of this challenge deprived the prisoners of the equal protection of laws. I am not claiming for them any new right, but only the protection of the State laws for their trial. The panel should have been discarded, and a new
55 venire awarded on the terms of the law, without distinction of race or color. I see nothing in the State law to forbid it; on the contrary, ample discretion to that end is reposed with the judge by the Code of Virginia, chap. 158, § 16, 17, p. 1062.

The question recurs, was not its denial under the circumstances a denial to the prisoner of the equal protection of the laws? It is greatly to be deplored that no uniform practice obtains in this regard throughout the commonwealth, though the law is the same everywhere. I am informed that the judge of this county invariably gives the accused, when colored, the benefit of a mixed jury, and that it is believed that no harm has ever resulted from it, or any failure of punitive justice. The same, I am told, is the practice in other counties of the commonwealth, and I trust, one of the effects of the agitation of this question will be to extend it. If this should become general or be required by law, all pretence for Federal interference would be removed, and the law and practice would conform in leading to the just enforcement of equal civil rights to all colors and races. If negroes were to be tried by former slaveholders, once allied to them by interest, affection, and sympathy, the danger might not be great, but if these people are to depend for their lives, liberty, and property on the white men who never knew or felt these ties, I regret to say they are without the guar'tees enjoyed by others from the jury trial secured by Article VI of the amendments to the Constitution.

56 From this comparison of the law of Congress, with this amendment, I am constrained to conclude that the former strictly pursues the latter; is in conformity thereto, and therefore constitutional. Had I come to a different conclusion, I should have felt bound to disregard these enactments. True, I should have felt all the delicacy becoming an inferior judge in pronouncing a law of Congress unconstitutional; but I should not have shrunk from the responsibility of doing so, if on mature reflection I should have come to that conclusion.

It is a well-settled doctrine even in courts of the last resort, that a law is not to be lightly pronounced unconstitutional; and never, in a case of doubt. The reasonable presumption is in favor of its constitutionality.

But it is because I believe the Constitution and the law both require it of me I grant the relief sought of me; surely not under the rediculous idea that I have any jurisdiction over State crimes or any authority to prosecute them; but merely to secure for the petitioners here the equal protection of the laws of the State as guaranteed by the XIVth amendment and the law in pursuance thereof. No one can be more sensible than I am of the anamoly of trying these cases at my bar. I have nothing to say of the wisdom, the expediency, or fitness of this legislation; the least I can say is that it gives an anomalous jurisdiction to this court, not easily understood or reconcilable with past practices, but it is sufficient for me to be convinced that I am thus directed by
Congress, in legislation which they have deemed appropriate to
57 the enforcement of this fundamental part of its reconstruction policy. Nor do I see how any mind conceding the constitutionality of these enactments can arrive at any other conclusion than the absolute right of the parties under the terms of the law to this relief. It ought to be observed that the trial had in one of these cases was in plain defiance of the law, which directed all further proceedings to cease on the filing of the petition. That trial must, therefore, go for nothing in this case, if I am to be governed by the plain terms of these enactments.

The law left nothing to the discretion of the State judge, save the implied discretion to deny the petition; but such denial was to avail nothing; the case was thereby arrested, and the question remitted to this court at its first session thereafter. I presume as the county of Patrick is annexed by the ruling of this court to the court held at this place, this term may well be regarded as the first, after the filing of these petitions. This is the next circuit court in the terms of the law held for this part of the district where parties reside, and whence witnesses are to be summoned.

In this particular case, where a trial was had in defiance of act of Congress interdicting all further proceedings after the filing the petition for removal, I would be justly implicated in this contempt of the law if I did not hold it as cause of removal.

I have treated this exclusively as a question of removal, and not as application for a habeas corpus, as I have already premised. I take no
note of the allegation of petitioners, that they believe and declare
58 they cannot get a fair trial in the State court; that is alien to the merits of their application, and has no rightful place here. Their relief and the removal they seek can alone be predicated of some obstruction to their impartial trial, arising out of the action of the court, and the selection of a jury with reference, whether designed or not, to color and race. In case of Federal officers, indicted in the State courts for State offences, I have exercised the same jurisdiction without objection from any quarter.

If there shall be found to be, on enquiry, a want of uniformity, or even semblance of in justice, in the practice of the judges or courts in the particular I have named, it is fair to presume it will be rectified in time to avoid this unseemly collision and anomalous interference with the trial of State offences. If there be anything unfair and repulsive to the ordinary instincts of justice, and in conflict with all our notions of jury trials, in trying negroes exclusively by white men, wholly alien to them in interest and feeling, it admits of speedy redress by the State. I can conceive of no stronger motive on the grounds of humanity and practical statesmanship than that which now exists with the State, who enjoys the fruits

of her restoration to the Union by virtue of her formal ratification of this amendment, to observe on her part in all the departments of her service, scrupulously, both in spirit and in deed, its requirements, and to guard and protect, beyond all unfriendly cavil, the civil rights of this humble class of its useful laborers. We must feel that when the State does its full duty under this amendment there can no longer
59 be a possibility of the interference which offends her dignity and arouses her indignation. Her own independent sense of justice will have righted the wrong, and all this conflict will cease for the future.

But without resting on such speculations, but expressing them with entire deference to my State and its courts, I am constrained by my interpretation of the law and Constitution to enter the following order:

At a circuit court for the western district of Virginia held at Danville on the 15th day of November, 1878, Burwell and Lee Reynolds, by their counsel, submitted to the court a petition by them presented to the judge of the circuit court for the County of Patrick for the removal of the prosecutions against them into this court, which petition is a part of the record, which said petitioners have procured of the clerk of the said circuit court of Patrick, and now offer to file in this court, praying that said prosecutions may be here docketed, and proceeded with here, the court being of opinion that said petitioners have been denied such a trial as is secured to them by the laws of this State by competent jurors without distinction of race or color, doth direct said causes, upon the petition aforesaid, to be docketed in this court for trial; and the clerk is hereby authorized to issue forthwith a writ of habeas corpus cum causa to the marshal of this district to take the bodies of said defendants into his custody, to be dealt with according to law and the orders of this court; and that the clerk of this court, in the vacation thereof, direct to the said marshal a writ of venire facias for twenty-
60 five jurors, qualified as such by the laws of this State, without distinction of race or color, to attend on the first day of next term for the trial of said cases at the bar of this court.

Circuit court of the United States of America, western district of Virginia.

The United States of America to the marshal of the United States for the western district of Virginia, greeting:

Whereas Burwell and Lee Reynolds have petitioned the circuit court of the United States for the western district of Virginia, sitting at Danville, being in the jail of Patrick, on criminal prosecutions, wherein they allege that they have been denied a trial by an impartial jury, selected without distinction of race and color, as assured to them by the laws of this State, and of Congress, and their cases have been docketed in the said circuit court of the United States for trial therein, in pursuance of sect. 641 of the Rev'd Stat's of the United States: We therefore command you, in consideration of the premises, that the bodies of said Burwell and Lee Reynolds, by whatever name called, together with the day, and cause of their detention, you have before the judge of our said circuit court of the United States at Danville, on the first day of next term to do and receive what our said court then and there of them on this part shall consider.

Witness Hon. M. R. Waite, Chief Justice of the Supreme Court
61 of the United States of America, at Danville, this 22d day of

November, in the year of our Lord one thousand eight hundred and seventy-eight, and of our Independence the 103 year.

[SEAL.] CHARLES P. LATHAM,
Clerk U. S. Cir. Court, West. Dist. of Va

UNITED STATES MARSHAL'S OFFICE.
Danville, Virginia, February 25th, 1879.

This writ was executed by Deputy Marshal Grief Lamkin, on the 24th day of November, 1878, by taking the bodies of the within named Lee Reynolds and Burwell Reynolds from the jail of Patrick County, Virginia, and conveying them to the jail of Pittsylvania County, Virginia, where they were confined in my custody until the 19th day of December, 1878, when they were conveyed by Deputy Marshal D. S. Lewis to the jail of Rockingham County, Virginia, where they were confined for safe keeping until the 23d of February, 1879, when they were conveyed to Danville, Virginia, and are this day delivered before the U. S. circuit court, according to the within writ.

The day and cause of their detention in the jail of Patrick County, Virginia, are fully set forth in the record exhibited with the petition in re Lee Reynolds and Burwell Reynolds, filed in the U. S. circuit court at Danville, Virginia.

JOHN F. LEWIS,
United States Marshal, Western District of Virginia.

Filed 25th February, 1879.

62 Pleas at the court-house of the county of Patrick, before the circuit court for said county, on the 31st day of October, 1878.

Be it remembered, that the grand jurors, E. B. Turner, foreman, Alexander Thompson, A. J. Willis, Claiborne Edons, J. H. Cruise, S. J. Martin, T. J. Clark, J. F. Noel, E. P. Barnard, W. R. Hagood, Ishame Cockrane, A. J. Harbour, A. L. Spencer, Peter L. Penn, and James Boyd, impaneled and sworn in the county court of Patrick, at the term thereof commencing on the 29th day of January, 1878, in and for the body of said county and attending said court, were charged and sent to their room to consult, and after some time returned into court and presented an indictment against Burwell and Lee Reynolds for murder, a true bill; which indictment, with the endorsement thereon by the foreman, is in the words following, to wit:

STATE OF VIRGINIA.
County of Patrick, to wit:

The jurors of the commonwealth of Virginia, in and for the body of the county of Patrick, and now attending the said court, upon their oaths present that Burwell Reynolds, late of the said county, labourer, and Lee Reynolds, late of the said county, labourer, on the 29th day of November, in the year of our Lord 1877, with force and arms, at aforesaid, in the county aforesaid, in and upon one Aaron C. Shelton, in the peace of God, and of their malice aforethought, did make an assault, and that they, the said Burwell Reynolds and the said Lee Reynolds, with a certain knife of the value of fifty cents, in the hands
63 of the said Burwell Reynolds, then and there being had and held, the said Aaron C. Shelton in and upon the left side of the body, on the left side of the backbone, and between the ribs of him the said Aaron C. Shelton, then and there feloniously, willfully, and of their

malice aforethought, did strike and thrust, giving to the said Aaron C. Shelton, then and there with the knife aforesaid, in and upon the left side of the body, on the left side of the backbone, between the ribs of him the said Aaron C. Shelton, one mortal wound, of the breadth one inch and a half, and of the depth of four inches, of which said wound the said Aaron C. Shelton from the 29th day of November, in the year aforesaid, until the 1st day of December, in the same year, at aforesaid, did languish and languishing did live, on which said first day of December, in the year aforesaid, the said Aaron C. Shelton, at aforesaid, in the county aforesaid, of the said mortal wound died, and so the jurors aforesaid upon their oaths aforesaid do say that the said Burwell Reynolds and the said Lee Reynolds, him, the said Aaron C. Shelton, in the manner and by the means aforesaid, feloniously, willfully, and of their malice aforethought, did kill and murder, against the peace and dignity of the commonwealth of Virginia.

And the jurors aforesaid, upon their oaths aforesaid, do further present that the said Burwell Reynolds, late of the county of Patrick, labourer, and the said Lee Reynolds of the county of Patrick, labourer, on the 29th day of November, in the year of our Lord 1877, with force and arms at
64 aforesaid, in the county aforesaid, in and upon Aaron C. Shelton, in the peace of God and the said State, then and there being feloniously, willfully, and of their malice aforethought, did make an assault; and that the said Burwell Reynolds, with a certain knife of the value of fifty cents, which the said Burwell Reynolds in his hand then and there had and held, the said Aaron C. Shelton in and upon the left side of the body, on the left side of the backbone between the ribs of him the said Aaron C. Shelton, then and there feloniously, willfully, and of his malice aforethought did strike and thrust, giving to the said Aaron C. Shelton then and there, with the knife aforesaid, in and upon the left side of the body, on the left side of the backbone between the ribs of him the said Aaron C. Shelton, one mortal wound of the breadth of one inch and a half and of the depth of four inches, of which said mortal wound the said Aaron C. Shelton from the 29th day of November, in the year aforesaid, until the first day of December in the same year, at aforesaid, in the county aforesaid, did languish, and languishing did live, on which said first day of December in the year aforesaid, the said Aaron C. Shelton at aforesaid, in the county aforesaid, of said mortal wound died, and that the said Lee Reynolds at the time of committing the felony and murder aforesaid by the said Burwell Reynolds in the manner and form aforesaid, feloniously, willfully, and of
65 his malice aforethought was present, aiding, helping, abetting, assisting, comforting, and maintaining the said Burwell Reynolds the felony and murder aforesaid, in manner aforesaid and form aforesaid, to do, commit, and perpetrate. And so the jurors aforesaid do say that the said Burwell Reynolds and the said Lee Reynolds him the said Aaron C. Shelton in the manner and by the means aforesaid, feloniously, willfully, and of their malice aforethought did kill and murder against the peace and dignity of the commonwealth of Virginia upon the evidence of Green Shelton, A. A. Shelton, and Alice Nowlin sworn in court to give evidence before the grand jury.

A true bill.

E. B. TURNER, *Foreman.*

And now at this day, to wit, at a county court continued and held for the county of Patrick at the court house thereof on the 31st day of Jan'y, 1878, Burwell Reynolds, late of the county of Patrick, labourer, who

stands jointly indicted with one Lee Reynolds, late of the county of Patrick, labourer, for murder, electing to be tried separately, was
66 led to the bar in custody of the jailor of this court, and on being arraigned plead not guilty to the indictment, and demanded to be tried in the circuit court of this county; whereupon it is ordered by said court that the said Burwell Reynolds be remanded to the jail of this county for trial before the said circuit court at the next term thereof, and that all the witnesses for the prosecution be recognized to appear before the said circuit court on the first day of the said next term, and that the clerk of this court certify and transmit to the clerk of the said circuit court a transcript of the proceedings in this court in relation to the said prosecution, and a copy of the indictment, all recognizances, and the other papers connected with the case.

(Warrants recognizances omitted here in this record.)

Lee Reynolds, late of the county of Patrick, labourer, who was jointly indicted with Burwell Reynolds, late of the county of Patrick, labourer, for murder, elected to be tried separately, was also led to the bar in custody of the jailor of this court, on the same day, and being arraigned plead not guilty to the indictment. Whereupon the said Lee Reynolds demanded to be tried in the circuit court of this county; it was thereupon ordered that the said Lee Reynolds be remanded to jail for trial before the said circuit court on the first day of the next term, and that all material witnesses for the prosecution be recognized for their appearance before the said circuit court on the first day of the next term. And that the clerk of this court certify and transmit to the clerk of
67 the said circuit court a transcript of the record of the proceedings in the county court in relation to the prosecution and a copy of the indictment and all other papers connected with the case.

COMMONWEALTH
vs.
BURWELL AND LEE REYNOLDS.

The deposition of Aaron C. Shelton, taken before me, Wm. W. Moir, a commissioner in chancery of Patrick County court, on the first day of December, 1877, at the residence of Joshua Craddocks, in Patrick County, Virginia, upon what his physician supposes to be his death bed, to be read as evidence in any prosecution of the commonwealth against the said parties.

The said Aaron C. Shelton, first being duly sworn, deposeth as follows:

On the 29th November I was hauling stocks on the hill this side of T. S. Campbell's mill, and Asa Tuggle was cutting; Lee Reynolds came up, and I said to him, I suppose you have threatened to take my life with that stick and gun, and he said that he would kill me if I did not run, and if I ran, that he would make his two dogs, then with him, catch me. I said to him, "Look here, boy, do you know who you are talking to?" I was setting on the wagon at this time, and then got off the wagon to load my log, and just as I got off the wagon, he cocked his gun, and I step'ed up to him as quick as I could, and jerked the stick from
68 him, and knocked him over the log that we were going to load on the wagon, and just as he fell Burwell Reynolds ran up and stabbed me with a large knife in my back. The stick now shown me is the

one I jerked from Lee Reynolds and struck him with; when he stabbed me I fell, and they both ran off and left me.

his
AARON C. + SHELTON.
mark.

Witness:
J. T. CLARK.
A copy. Teste:

L. G. RUCHER, *Clerk.*

At another day, to wit, at a circuit court held for the county of Patrick, at the court-house thereof, on the first day of April, 1878, Burwell Reynolds, late of the county of Patrick, labourer, and Lee Reynolds, late of the county of Patrick, labourer, who stands jointly indicted for murder, was led to the bar in custody of the jailor of this court. Whereupon the accused by counsel moved the court that the venire in this case, composed entirely of the white race, be so modified as to allow one-third of the venire to be composed of their race, they being colored, which motion was overruled upon the ground that the court had no authority to change the venire, it appearing to the satisfaction of the court that the said venire had been regularly drawn from the jury box according to law. The accused by counsel then appealed to the attorney for the commonwealth, and the counsel assisting in the prosecution, that as the
ballots in the jury box were entirely of the white race, they, the
69 said attorney for the commonwealth, and the feed counsel assisting in the prosecution, allow them, the accused, a venire composed of one-third of their own race, they, the accused, waiving all objections to the illegality of so constructing the same, which the attorney for the commonwealth and the feed counsel for the prosecution refused. Thereupon the prisoners, by counsel, filed their petition, verified by their affidavits, praying that this prosecution may be removed to the next circuit court to be held for the United States for the western district of Virginia, in the town of Danville, which prayer was denied by the court.

Which said petition is in the words and figures following, to wit:

To the judge of the circuit court of Patrick:

Your petitioners, Lee and Burwell Reynolds, represent that there is now pending against them a criminal prosecution in the circuit court of Patrick, in which they are charged with the murder of one Aaron C. Shelton. Your petitioners are negroes, aged respectively 17 and 19. That the man whom they are charged with having murdered was a white man. Your petitioners allege that the right secured to them by the law, providing for the equal civil rights of all the citizens of the United States, is denied to them in the judicial tribunals of the county of Patrick, of which county they are natives and citizens. They allege that by the laws of Virginia, all male citizens twenty-one years of age, and not over sixty,
70 who are entitled to vote and hold office under the constitution and laws of this State, shall be liable to serve as jurors. This law allows the right as well as requires the duty of the race to which they belong to serve as jurors. Yet the grand jury who has made indictment against them as well as the venire summoned to try them are exclusively composed of the white race. They have applied through their counsel to your honor, the judge of said court, and also to the prosecuting attorney of said county, as well as to the feed counsel employed to assist in

the prosecution, that a portion of the venire by which they are to be tried in said circuit court of Patrick should be at least in part composed of competent jurors of their own race and color; this right has been refused. They allege that a strong prejudice exists in the community against them independent of the merits of the case, and based solely upon the fact that your petitioners, the accused, are negroes, and that the man whom they are charged with having murdered was a white man. From this fact alone they are satisfied that they cannot obtain an impartial trial before a jury composed entirely of the white race. They allege that their race have never been allowed the right to serve as jurors either in civil or criminal cases in the county of Patrick, in any case civil or criminal in which their race have ever been in any way interested up to the present time.

Your petitioners therefore pray that said prosecution may be removed to the next circuit court to be held for the United States for the
71 western district of Virginia, in the town of Danville.

STATE OF VIRGINIA,
County of Patrick:

This day Burwell Reynolds and Lee Reynolds made oath before me that the facts set forth in the foregoing petition are true to the best of their knowledge and belief.

Given under my hand this 1st April, 1878.

A. J. STEDMAN,
Com'r in Chancery.

The prisoners having elected to be tried separately, Burwell Reynolds was put upon his trial; whereupon a panel of sixteen jurors selected from the thirty summoned by the sheriff were examined by the court, and found free from all legal exceptions, and qualified to serve as jurors according to law, and the accused having erased from the panel four of said jurors, W. T. Thomas, D. J. Morrison, C. J. Martin, John Dehart, D. K. Harroll, J. A. Nolin, I. J. Harrington, W. W. Bowlin, Thomas H. Holt, B. T. Hylton, Wm. Barrard, and C. C. Willis, to whom there was found no objection, being sworn the truth of and upon the premises to speak, having partly heard the evidence, were given charge of deputy sheriffs R. M. McArthur and H. H. Clark, to whom was administered the usual oath, and the prosecution adjourned over until to-morrow morning 10 o'clock, and the prisoners were remanded to jail.

72 At another day, to wit, at a circuit court continued and held for the county of Patrick, at the court-house thereof, on the 2d day of April, 1878, Burwell Reynolds, late of the county of Patrick, labourer, who stands jointly indicted with Lee Reynolds, late of the county of Patrick, labourer, was again led to the bar in custody of the jailor of this court, and the jury sworn on yesterday the truth of and upon the premises to speak came into court in charge of R. M. McArthur and Henry C. Clark, deputy sheriffs, pursuant to their adjournment, and, having fully heard the evidence and arguments of counsel, were sent to their room to consult on a verdict, and after some time came into court, and not having agreed upon a verdict were given in charge of deputy sheriffs H. C. Clark and A. W. Houchins, to whom was administered the usual oath, and adjourned over until to morrow morning, 10 o'clock. And the prisoner was remanded to jail.

And at another day, to wit, at a circuit court continued and held for the county of Patrick, at the court-house thereof, on the 3rd day of April, 1878, Burwell Reynolds, late of the county of Patrick, labourer, who stands jointly indicted with Lee Reynolds, late of the county of Patrick, labourer, was again led to the bar in custody of the jailor of this court, and the jury sworn on the first day of the term the truth of
73 and upon the premises to speak appeared in court in charge of H. C. Clark and A. W. Houchings, deputy sheriffs, pursuant to their adjournment, and were sent to their room to consult on a verdict, and after some time came into court, having found the following verdict, to wit: We, the jury, find the prisoner, Burwell Reynolds, guilty of murder in the first degree, in manner and form as charged in the indictment. Whereupon, on motion of the prisoner, by counsel, and for reasons appearing to the court, it is ordered that the said verdict be set aside, and that a new trial be had upon the said indictment at the next term. And the prisoner is remanded to jail.

And at another day, to wit, at a special term of the circuit court for the county of Patrick, held at the court-house thereof on the 28th October, 1878, Burwell Reynolds, late of the county of Patrick, labourer, and Lee Reynolds, late of the county of Patrick, labourer, who stands jointly indicted of murder, were led to the bar in custody of the jailor of this court, and the prisoners, the said Burwell Reynolds and the said Lee Reynolds, before the empanelling of the jury for their trial at this term, charged with murder of Aaron C. Shelton, moved the court to remove said prosecution to the next term of the United States circuit court to be held in Danville, Virginia, upon the ground set forth in their petition, presented and
74 filed at the April term, 1878, of this court; which motion was again overruled, and the prayer of the petitioner refused. The prisoners electing to be tried separately, Burwell Reynolds was put upon his trial; whereupon a panel of sixteen, selected from the twenty-four summoned by the sheriff, were examined by the court, and found free from all legal exceptions, and qualified to serve as jurors according to law; and the prisoner Burwell Reynolds having erased from the panel four of said jurors, B. R. Hall, Wm. M. Frances, Walker Carter, D. G. Hatcher, M. E. Lewis, Z. T. Turner, John Tuggle, Richard Cochran, Wilson J. West, B. P. Pace, E. P. Newman, and George R. King, to whom there was found no objection, being sworn the truth of and upon the premises to speak, having partly heard the evidence, the further prosecution of this cause was continued until to-morrow morning, 10 o'clock, and the jury given in charge of R. M. McArthur and Henry C. Clark, deputy sheriffs, to whom was administered the usual oath, and the prisoner remanded to jail.

And at another day, to wit, at a special term of the circuit court for the county of Patrick, at the court-house thereof, on the 29th day of October, 1878, Burwell Reynolds, late of the county of Patrick, labourer, who was jointly indicted with one Lee Reynolds, late of the county of Patrick, laborer, was again led to the bar in custody of the jailor of this court, and the jury sworn on yesterday the truth of and upon the
75 premises to speak appeared in court in charge of deputy sheriffs R. M. McArthur and Henry C. Clark, pursuant to their adjournment, and having heard the evidence, partly heard the argument of counsel, were again given in charge of R. M. McArthur and H. C. Clark, deputy sheriffs, to whom the usual oath was administered, and adjourned

over until to-morrow morning, 9 o'clock, and the prisoner was remanded to jail.

At another day, to wit, at a special term of the circuit court for the county of Patrick, held at the court-house thereof, on the 30th day of October, 1878, Burwell Reynolds, late of the county of Patrick, labourer, who was jointly indicted with one Lee Reynolds, late of the county of Patrick, labourer, of murder, was again led to the bar in custody of the jailor of this court; and the jury sworn on the first day of the term the truth of and upon the premises to speak, and adjourned on yesterday, again appeared in court in charge of deputy sheriffs McArthur and Clark, pursuant to their adjournment, and after fully hearing the argument of counsel, were sent to their room to consult of a verdict, and after an absence of some time came into court and upon their oath do say that they cannot agree upon a verdict; whereupon the jury was adjourned over until to-morrow morning, 10 o'clock, and given in charge of dep-
76 uty sheriffs R. M. McArthur and H. C. Clark, to whom was administered the usual oath, who were directed to take them out of court to some convenient room, there to be kept together without communication with any one; and the prisoner Burwell Reynolds was remanded to jail.

And now, at this day, to wit, at a special term of the circuit court for the county of Patrick, held at the court-house thereof on the 31st day of October, 1878, Burwell Reynolds, late of the county of Patrick, labourer, who stands jointly indicted with Lee Reynolds, late of the county of Patrick, labourer, was again led to the bar in custody of the jailor of this court, and the jury adjourned over on yesterday came into court in charge of deputy sheriffs R. M. McArthur and H. C. Clark, pursuant to their adjournment, and were sent to their room to consult of a verdict, and after some time was brought into court in custody of the said deputy sheriffs, and on being called and asked if they had agreed upon a verdict they unanimously replied that they had not, and the court having asked the jury if there was a probability of their agreeing upon a verdict, they unanimously replied there was none. Whereupon, by consent, it was ordered that D. G. Hatcher, one of the jurors aforesaid, was with-
77 drawn, and the rest from rendering their verdict discharged. And the prisoner is remanded to jail.

At a circuit court continued and held for the county of Patrick, at the court-house thereof, on the third day of April, 1878, Lee Reynolds, late of the county of Patrick, labourer, who stands jointly indicted with Burwell Reynolds, late of the county of Patrick, labourer, for murder, was led to the bar in custody of the jailor of this court. Whereupon a panel of sixteen jurors, selected from the thirty-six summoned by the sheriff, were examined by the court and found free from all legal exceptions, and qualified to serve as jurors, according to law, and the prisoner having erased from the panel four of said jurors, C. J. Wright, John W. Foley, Jacob Williams, Wm. F. Murphy, A. J. Handy, T. J. Clark, A. J. Collins, John Barnard, C. G. Bowman, Wm. H. Headen, Green Vaughan, and R. H. Harbour, to whom there was no objection, being sworn the truth of and upon the premises to speak, having heard the evidence and arguments of counsel, were sent to their room to consult of a verdict, and after some time was brought into court, and not having agreed, were adjourned over until to-morrow morning 9 o'clock, and given in charge of deputy sheriffs R. M. McArthur and A. W.
78 Houchins, to whom the usual oath was administered. And the prisoner was remanded to jail.

And at another day, to wit, at a circuit court continued and held for the county of Patrick, at the court house thereof, on the 5th day of April, 1878, Lee Reynolds, late of the county of Patrick, labourer, who stands jointly indicted with Burwell Reynolds, late of the county of Patrick, labourer, of murder, was again led to the bar, in custody of the jailor of this court, and the jury sworn on yesterday the truth of and upon the premises to speak was brought into court in charge of R. M. McArther and A. W. Houchins, deputy sheriffs, pursuant to their adjournment, and were sent to their room to consult, and after some time were brought into court in charge of said deputy sheriffs, having found the following verdict, to wit: We, the jury, find the prisoner, Lee Reynolds, guilty of murder in the second degree, in manner and form as charged in the indictment, and ascertain the term of his confinement in the penitentiary to be the period of fifteen years. Thereupon the prisoner, Lee Reynolds, by counsel moved the court to set aside the verdict and grant him a new trial, and the court takes time. And the prisoner, Lee Reynolds, is remanded to jail.

79 And at another day, to wit, at a circuit court continued and held for the county of Patrick, at the court house thereof, on the 5th day of April, 1878, Lee Reynolds, late of the county of Patrick, labourer, who stands jointly indicted with Burwell Reynolds, late of the county of Patrick, labourer, for murder, was again led to the bar, in custody of the jailor of this court, and the court being advised of its judgment, the prisoner's motion for a new trial, overrules the said motion.

Thereupon it was demanded of the prisoner if anything for himself he had or knew to say why the court should not now proceed to pronounce judgment against him according to law, and nothing being offered in delay of judgment, it is considered by the court that the said Lee Reynolds be imprisoned in the penitentiary of this commonwealth for the term of fifteen years, to be treated in the manner prescribed by law, and the sheriff of this county is ordered as soon as possible after the adjournment of this court to remove and convey the said prisoner, Lee Reynolds, from the jail of this county to the penitentiary of the commonwealth, therein to be kept imprisoned and treated in the manner directed by law for the term aforesaid.

80 On the trial of this prosecution the prisoner, by counsel, excepted to the opinion of the court overruling his motion for a new trial and tendered his bill of exceptions, which was received, signed, and ordered to be made a part of the record. And the prisoner is remanded to jail.

In the clerk's office of the circuit court for the county of Patrick, at the court-house of said county, in the vacation of said court, on the 17th day of October, 1878, the following mandate was received and entered, in the words and figures following, to wit:

VIRGINIA:

At a supreme court of appeals, held at the court-house of Wythe County, in the town of Wytheville, on the 30th day of July, 1878.

LEE REYNOLDS, PLAINTIFF IN ERROR,
against
THE COMMONWEALTH, DEFENDENT IN ERROR.

Upon a writ of error to a judgment of the circuit court of Patrick

County, render'd on the 3d day of April, 1878, on an indictment of the said plaintiff in error for murder.

This day came again as well the said plaintiff in error, by his counsel, as the Commonwealth, by the attorney-general, and the court, having maturely considered the transcript of the record of the judg-
81 ment aforesaid and the argument of counsel, is of opinion, for reasons stated in writing and filed with the record, that the facts certified as proved on the trial did not warrant the jury in finding the plaintiff in error, Lee Reynolds, guilty of the homicide charged in the indictment, and therefore the court erred in overruling the motion of the plaintiff in error to *s*it aside the verdict and grant him a new trial, because the verdict was against the evidence.

Therefore it is considered, ordered, and adjudged that the said judgment of the said circuit court be reversed and annulled, the said verdict set aside, and the cause be remanded to the said circuit court for a new trial to be had therein of the said plaintiff in error, Lee Reynolds, upon the said indictment. Which is ordered to be certified to the said circuit court of the county of Patrick.

A copy. Teste:

JOS. W. CALDWELL, *C. C.*

And at another day, to wit, at a special term of the circuit court for the county of Patrick, held at the court-house thereof on the 28th day of October, 1878, Burwell Reynolds, late of the county of Patrick, labourer, and Lee Reynolds, late of the county of Patrick, labourer, who stands indicted of murder, were led to the bar in custody of
82 the jailor of this court; and the said Burwell Reynolds and the said Lee Reynolds, before the empaneling of the jury for their trial at this term, charged with the murder of Aaron C. Shelton, moved the court to remove the said prosecution to the next term of *of* the United States circuit court, to be held in Danville, Virginia, upon the ground set forth in their petition, presented and filed at the April term, 1878, of this court, which motion was again overruled and the prayer of the petitioners refused. The prisoners having elected to be tried separately, Lee Reynolds was remanded to jail.

And at another day, to wit, at a special term of the circuit court of Patrick County, continued and held for the county of Patrick, at the court-house thereof, on the 3d day of October, 1878, Lee Reynolds, late of the county of Patrick, labourer, who stands jointly indicted of murder with one Burwell Reynolds, late of the county of Patrick, labourer, was again led to the bar by the jailor of this court, whereupon a panel of sixteen jurors, selected from those summoned by the sheriff, were examined by the court, and found free from all legal exceptions and qualified to serve as jurors according to law, and the prisoner having erased from the panel four of said jurors, L. G. Joyce, W. W. Stoops, C. J. Dalton, W. H. Wimbish, W. C. Lackey, Sparrel Wood, C.
83 W. Plasters, J. P. McGee, A. J. Dalton, Isham Barnard, McD. Ross, and James M. Rangeley, being sworn the truth of and upon the premises to speak, and having fully heard the evidence, the further prosecution of this cause is continued until to morrow morning, 9 o'clock. Thereupon the jury was given in charge of A. W. Houchins and D. E. Comer, deputy sheriffs, to whom was administered the usual oath, and directed to take the said jury out of court to some convenient room, there to be kept together without communication with any one, and to

be brought into court at the time aforesaid. And the prisoner was remanded to jail.

And now at this day, to wit, at a special term of the circuit court for the county of Patrick, held at the court-house thereof on the 31st day of October, 1878, Lee Reynolds, late of the county of Patrick, labourer, who stands jointly indicted with Burwell Reynolds, late of the county of Patrick, labourer, for murder, was again led to the bar in custody of the jailor of this court; and the jury sworn on yesterday the truth of and upon the premises to speak, and adjourned over until 9 o'clock this morning, came into court in charge of A. W. Houchins and D. E. Comer, deputy sheriffs, pursuant to their adjournment, and after fully hearing the evidence and arguments of counsel, were sent
84 to their room to consult of their verdict, and after some time was brought into court, having found the following verdict, to wit: "We, the jury, find the prisoner, Lee Reynolds, guilty of murder in the second degree, and ascertain the time of his confinement in the penitentiary to be 18 years"; whereupon the prisoner moved the court to set aside the verdict and grant him a new trial, which motion being heard, the same was overruled.

And it being asked of the prisoner if anything for himself he had or knew to say why this court should not now proceed to pronounce judgment against according to law, and nothing being offered or alleged in delay of judgment, it is considered by the court that the said Lee Reynolds be imprisoned in the penitentiary of this commonwealth for the term of eighteen years, and the sheriff of this county is ordered, as soon as possible after the adjournment of this court, to remove and convey the said Lee Reynolds from the jail of this court to the penitentiary of this commonwealth, therein to be kept, imprisoned, and treated in the manner directed by law for the term aforesaid.

MEMO.—The prisoner, by counsel, excepted to the opinion of the court overruling his motion for a new trial, and tendered his bill, which was signed by the court, and ordered to be made a part of the record in the cause.

85 STATE OF VIRGINIA,
County of Patrick, ss:

I, L. G. Rucker, clerk of the circuit court for the county of Patrick, in the State of Virginia, do hereby certify that the foregoing is a true transcript of the record and proceedings in a certain prosecution pending in said court against Burwell Reynolds and Lee Reynolds, on an indictment for murder, with all things touching the same, as fully and wholly as they now exist among the records of my office. (Except the recognizance of witnesses, the two bills of exceptions, and the facts certified.)

In testimony whereof I hereunto set my hand and annex the seal of said this 9th day of December, 1878.

[SEAL.]

L. G. RUCKER,
Clerk of Patrick Circuit Court.

A copy. Teste:
[SEAL.]

CH. P. LATHAM,
Clk U. S. Cir. C't, Danville, Va.

(Indorsed:) Supreme Court U. States. 1878. October term. Original No. 4. Ex parte: In the matter of the Commonwealth of Virginia. Petitioner. Return to rule. Filed 18th March, 1879.

OCTO. TERM.

ORIGINAL.—NO. 3.

EX PARTE: IN THE MATTER OF THE COMMONWEALTH OF VIRGINIA, PETITIONER.

Replication.

And the said Commonwealth of Virginia says that the matters and things set forth and alleged in the answer of the said Alexander Rives, district judge of the western district of Virginia, to the citation issued to him by the order of this court, on the petition of said Commonwealth, show no cause why a writ of mandamus should not be issued by this court commanding him to cause to be delivered by the marshal of the said western district of Virginia, to the jailor of Patrick County, in said Commonwealth of Virginia, the bodies of Burwell Reynolds and Lee Reynolds, to be dealt with according to the laws of the said Commonwealth. Wherefore the said Commonwealth of Virginia prays this honorable court to issue its writ of mandamus to the said Alexander Rives, district judge as aforesaid, commanding to do so.

JAS. G. FIELD,
Att'y Gen'l of Va.

Filed 14 April, 1879.

87 Supreme Court U. S., 1878, Octo. term.

Original.—No. 3.

Ex parte: In the matter of the Commonwealth of Virginia, petitioner.

Addition to record.

At a circuit court continued and held for the county of Patrick, at the court house thereof, on the 5th day of April, 1878, Lee Reynolds, late of the county of Patrick, labourer, who was jointly indicted with Burwell Reynolds for murder, and thereof convicted, was again led to the bar in custody of the jailor of this court, and the court having maturely considered the prisoner's motion for a new trial, the same for reasons appearing to the court is overruled.

And it being demanded of the prisoner if anything for himself he had or knew to say, why this court should not now proceed to pronounce judgment against him according to law, and nothing being offered or alleged in delay of judgment, it is considered by the court that the said Lee Reynolds be imprisoned in the penitentiary of this Commonwealth

for the term of fifteen years, to be treated in the manner proscribed by law.

And the sheriff of this county is ordered as soon as possible
88 after the adjournment of this court to remove and convey the said Lee Reynolds from the jail of this court to the penitentiary of this Commonwealth, therein to be kept imprisoned and treated in the manner directed by law for the term aforesaid.

On motion of the prisoner, by counsel, execution of this judgment is suspended for ninety days from the adjournment of this court.

And the prisoner is remanded to jail.

On the trial of the prisoner, he, by counsel excepted, to the opinion of the court overruling his motion for a new trial, and tendered his bill, which was signed by the court and ordered to be made a part of the record in this prosecution.

At a special term of the circuit court for the county of Patrick, held at the court-house thereof, on the 31st day of October, 1878, Lee Reynolds, late of the county of Patrick, labourer, who, with one Burwell Reynolds, late of the county of Patrick, was jointly indicted for murder, was again led to the bar in custody of the jailor of this court, and the jury sworn on yesterday the truth of and upon the premises to speak, and adjourned until this morning 9 o'clock, and given in charge of A. W. Honchisis and David E. Conner, deputy sheriffs, to whom was
89 administered the usual oath, came into court pursuant to adjournment, and having fully heard the evidence and arguments of counsel were sent to their room to consult of a verdict, and after some time was brought into court, having found the following verdict, to wit:

"We, the jury, find the prisoner Lee Reynolds guilty of murder in the second degree, and ascertain the term of his confinement in the penitentiary to be eighteen years."

Whereupon the prisoner moved the court to set aside the verdict and grant him a new trial, which motion being heard the same for reasons appearing to the court is overruled.

And it being asked of the prisoner if anything for himself he had or knew to say why this court should not now proceed to pronounce judgment against him according to law, and nothing being offered or alleged in delay of judgment, it is considered by the court that the said Lee Reynolds be imprisoned in the penitentiary of this Commonwealth for the term of eighteen years.

And the sheriff of this county is ordered as soon as possible after the adjournment of this court, to remove and convey the said Lee Reynolds from the jail of this court to the penitentiary of this Common-
90 wealth, therein to be kept imprisoned and treated in the manner directed by law for the term aforesaid.

The prisoner stating that he desired to apply to the supreme court of appeals for a writ of error to the said judgment, the court suspends the said judgment for sixty days from this time, to enable him to apply for such writ.

On the trial of this cause the prisoner excepted to the opinion of the court, overruling his motion for a new trial, and tendered his bill of exceptions, which was signed by the court and ordered to be made a part of the record.

And the prisoner was remanded to jail.

STATE OF VIRGINIA,
County of Patrick, ss:

I, L. G. Rucher, clerk of the circuit court for the county of Patrick, in the State of Virginia, do hereby certify that the foregoing is a true transcript from the records of said court, containing the sentence against Lee Reynolds, at the April term, 1878, of said court, the suspending of the execution of the judgment, and entry of the bill of exceptions; and also the sentence against same prisoner at the October special term of said court, 1878, the suspending of the execution of the judgment, and entry of bill of exceptions.

Given under my hand and the seal of said court, at office, this 4th day of April, 1879.

Filed 14th April, 1879.

[SEAL.] L. G. RUCHER, *Clerk.*

Ex parte

IN THE

SUPREME COURT OF THE UNITED STATES.

APRIL, 1879.

ORIGINAL—No. ~~4~~ 3

EX-PARTE, THE COMMONWEALTH OF VIRGINIA, UPON PETITION FOR MANDAMUS.

98 U.S. 240 Ex parte Schwab.

BRIEF FOR THE PETITIONER

—BY—

JAMES G. FIELD, *Attorney General.*
WM. J. ROBERTSON, *Counsel.*

IN THE

SUPREME COURT OF THE UNITED STATES.

EX-PARTE, THE COMMONWEALTH OF VIRGINIA, UPON PETITION FOR MANDAMUS.

BRIEF FOR THE PETITIONER.

STATEMENT OF THE CASE.

Burwell Reynolds and Lee Reynolds were jointly indicted for murder in the county court for the county of Patrick, in the State of Virginia, at its January term, 1878.

On being arraigned they pleaded not guilty, and demanding to be tried in the circuit court of said county, were remanded for trial in that court.

When brought up for trial at the April term, 1878, of said circuit court, they made the motion and application for a jury composed in part of their own race (they being colored persons), which will be found on pages 6 and 7 of the record.

Said motion and application being overruled and refused, they then filed the petition, which will be found on pages 7 and 8 of the record, praying for the removal of the prosecution against them to the next circuit court to be held for the United States for the western district of Virginia, in the town of Danville. The prayer of said petition was denied by the court.

As explanatory of the reason given by the court for overruling said motion, it is proper to state that the law under which the *venire* had been summoned was the act approved on the 27th March, 1876, a copy of which, as well as of the statutes now in force in reference to the qualifications and mode of summoning juries in Virginia, is filed with this brief.

The prisoners having elected to be tried separately, Burwell Reynolds was then put upon his trial, and being found guilty of murder in the first degree, on his motion the verdict was set aside by the court and a new trial awarded him.

Lee Reynolds having, at the same term, been put upon his trial, was found guilty of murder in the second degree, and the period of fifteen years was fixed by the jury as the term of his confinement in the penitentiary; whereupon he moved the court to set aside the verdict and grant him a new trial, on the ground that the verdict was against the law and the evidence; which motion being overruled by the court, he excepted to the opinion of the court overruling the same, and the facts proved on the trial having been set forth in the bill of exceptions, a writ of error was sued out by him from the supreme court of appeals of Virginia, on the hearing of which on the 30th day of July, 1878, the judgment of the circuit court was reversed, the verdict of the jury set aside, and the cause remanded to the circuit court for a new trial to be had therein.

At the October term, 1878, of said circuit court Burwell Reynolds and Lee Reynolds were again brought up for trial, and before the empanelling of the jury for their trial, they moved the court to remove the prosecution against them to the next term of the United States circuit court to be held in Danville, Virginia, upon the ground set forth in their petition presented and filed at the April term, 1878; which motion was again overruled and the prayer of the petitioners refused, as will appear on page 15 of the record.

The prisoners were then again tried separately.

In the case of Burwell Reynolds, the jury being unable to agree upon a verdict, a juror was withdrawn, by consent, and he was remanded to jail to be thereafter tried.

Lee Reynolds was again convicted of murder in the second degree, and eighteen years fixed by the jury as the term of his confinement in the penitentiary.

He moved for a new trial, but his motion was overruled by the court and sentence pronounced in accordance with the verdict, he being remanded to jail until he should be removed to the penitentiary. He excepted to the opinion of the court overruling his motion for a new trial, and his bill of exceptions was duly signed and sealed and made part of the record of the case.

While the said Burwell and Lee Reynolds were thus imprisoned in the jail of Patrick county, the former until he should be again tried for the offence with which he was charged, the latter until he should be removed to the penitentiary under the sentence aforesaid, they procured from the clerk of the circuit court of Patrick county a copy of the record of said proceedings against them, which they offered to file in the circuit court of the United States for the western district of Virginia, held at Danville, submitting to said court the petition by them presented as aforesaid to the circuit court for the county of Patrick for the removal of the prosecutions against them into said United States circuit court, and prayed of said last mentioned court that said prosecutions should be therein docketed and proceeded with; which prayer was granted by the Hon. Alexander Rives, who, as district judge of the United States for the western district of Virginia, was then holding said circuit court, and an order was entered by said court, on the 15th day of November, 1878, directing said causes to be docketed in said court for trial, and authorizing the clerk to issue forthwith a writ of *habeas corpus cum causa* to the marshal of said district to take the bodies of said Burwell Reynolds and Lee Reynolds into his custody to be dealt with according to law, and the orders of said court, and also directing the clerk to direct to the marshal of the court, in vacation, a writ of *venire facias* for twenty-five jurors, qualified as such by the laws of the State of Virginia, to attend on the first day of the next term thereafter, for the trial of said causes at the bar of said court.

In obedience to said order a writ of *habeas corpus* was issued on the 22d day of November, 1878, by the clerk of said court, which was executed on the 24th day of that month by one of the deputies of the marshal of said district, by taking the said Burwell Reynolds and Lee Reynolds from the jail of Patrick county, Virginia, and out of the custody of the officers of said State; and the said Burwell Reynolds and Lee Reynolds have ever since been and still are in the custody of

said marshal, held for trial in the said circuit court for the western district of Virginia, at Danville.

The petition in this case has been filed in conformity with joint resolutions of the general assembly of Virginia, adopted on the 8th day of February, 1879 (a copy whereof is filed with this brief), in order that said state may regain, through her proper officers, the custody of the said Burwell Reynolds and Lee Reynolds, that they may be dealt with by her under and pursuant to her laws.

The Hon. Alexander Rives, judge as aforesaid, in his answer to the rule awarded against him to show cause why a *mandamus* should not be issued requiring him to cause the bodies of the said parties to be redelivered by the marshal of his district to the jailor of Patrick county, admits the facts as hereinbefore stated, and justifies his action upon the ground that the refusal of the circuit court of the State of Virgina, to set aside the *venire* which had been summoned for their trial, and give them a jury composed in part of their own race and color, was a denial to them of "the equal protection of the laws," and rendered it proper that their cases should be removed, under sections 641 and 642 of the Revised Statutes, into his court for trial.

BRIEF OF ARGUMENT.

The petitioning Commonwealth insists that the action of Judge Rives is wholly without authority, and that his court has not, and cannot have under the Constitution of the United States, any jurisdiction whatever of the cases over which he has assumed jurisdiction. The prosecutions against Lee and Burwell Reynolds are in the name and on behalf of the Commonwealth of Virginia, one of the States of the Federal Union; for the crime of murder committed within the territorial limits of said State.

By the Constitution of the United States it is expressly provided in paragraph 2, article 3, that "in all cases affecting ambassadors, other public ministers and consuls, and those in which a *State shall be a party*, the supreme court shall have original jurisdiction." The reference here to the State relates to her in her sovereignty, as one of the original sovereignties which called into existence the United States under a written constitution, in which certain powers and parts of her sovereignty were delegated, and all others reserved.

In the constitution conferring the delegated powers, a judiciary sys-

tem was provided for, to consist of one *supreme* court and such inferior courts as Congress may from time to time ordain and establish. (See section 1, article 3 of United States Constitution.) Having provided for the supreme court *eo nomine*, the second paragraph of section 2 of the same article, provided that in *all* cases in which a State (one of the constituent sovereignties) should be a party, the supreme court shall have original jurisdiction.

We insist that this means an *exclusive* original jurisdiction; and under no circumstances can an inferior court, called into existence by act of Congress, ever be clothed with the power to deal with a State or to decide any question of controversy with her respecting or arising out of her sovereignty. If Congress has ever attempted to clothe any such inferior tribunal with such a power or jurisdiction, then such attempt is nugatory, as being *ultra vires*. But in the further progress of this argument we propose to try to show that Congress has never made any such attempt.

Now, are the cases of which Judge Rives proposes to assume jurisdiction, cases in which the Commonwealth of Virginia is a party in the character of a sovereign State? That this is so, we think will be conceded. If not conceded, it is susceptible of a demonstation. The right to make laws and to punish crime are acts of sovereignty. Chief Justice Waite, in delivering the opinion of the court in United States *vs.* Cruikshank & *al.*, 2 Otto, page 553, says: "The rights of life and personal liberty are natural rights of man." "To secure these rights," says the Declaration of Independence, "governments are instituted among men, deriving their just powers from the consent of the governed."

"The very highest duty of the States when they entered into the Union, under the constitution, was to protect all persons within their boundaries in the enjoyment of these 'inalienable rights with which they were endowed by their Creator.' Sovereignty for this purpose rests alone with the States. It is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or murder within a State, than it would be to punish for false imprisonment or murder itself." In the same case, at page 555, the Chief Justice further says: "The equality of the rights of citizens is a principle of Republicanism. Every Republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if

within its power. That duty was originally assumed by the States and it still remains there. The only obligation resting upon the United States is to see that the States do not deny the right."

At page 551 the Chief Justice further says: "The government of the United States is one of delegated powers alone. Its authority is defined and limited by the constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the constitution or laws of the United States, except such as the government of the United States has the authority to grant or secure. All that cannot be so granted or secured are left under the protection of the States."

In the case of Moore *vs.* The People of the State of Illinois, 14 Howard, p. 19, Justice Grier delivering the opinion of the court and speaking of the State of Illinois, which made it an offence to harbor or secrete a negro slave, &c., says: "It is but the exercise of the power which every State is admitted to possess of defining offences and punishing offenders against the laws. The power to make municipal regulations for the restraint and punishment of crime, for the preservation of the health and morals of her citizens, and the public peace, has never been surrendered by the States, or restrained by the constitution of the United States."

To allow the intervention of the United States in the administration and execution of the criminal laws of the State is to destroy the autonomy of the State government. In delivering the opinion of this court in Texas *vs.* White, 7 Wallace, p. 725, Chief Justice Chase said: "But the perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or the right of self-government by the States. Under the articles of confederation each State retained its sovereignty, freedom and independence, and every power, jurisdiction and right not expressly delegated to the United States. Under the constitution, though the powers of the States were much restricted, still all powers not delegated to the United States, nor prohibited to the States, are reserved to the States respectively, or to the people. And we have already had occasion to remark at this term, that 'the people of each State compose a State, having its own government and endowed with all the functions essential to separate and independent existence,' and that 'without the States in union there could be no such political body as the United States.'

Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the constitution, but it may not unreasonably be said that the preservation of the States and the maintenance of their governments are as much within the design and care of the constitution as the preservation of the Union and the maintenance of the National Government. The constitution in all its provisions looks to an indestructible Union composed of indestructible States."

In delivering the opinion of this court in the case of The Collector *vs.* Day, Mr. Justice Nelson said: "The general government and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former in its appropriate sphere is supreme, but the States within the limits of their powers not granted, or in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States."—11 Wallace, 124. Mr. Justice Bradley, in dissenting from the opinion of Mr. Justice Nelson in the above case, said: "I am as much opposed as any one can be to any interference by the general government with the just powers of the State governments."—*Ibid*, 129.

We submit, if there are any "just powers" of the State with which the general goverment cannot interfere, the power to try and punish the violations of her criminal laws occurring within her territorial limits and jurisdiction is one of them. Here, as Mr. Justice Nelson says, the State is a "*separate and distinct sovereignty.*"

The State acting here as a "separate and distinct sovereignty," it is not within the power of Congress, by any law which it may enact, to subject her to the jurisdiction of any tribunal ordained by it. If amenable to any judicial tribunal under the constitution of the United States, that tribunal is the supreme court.

The next proposition we submit is, that the Constitution of the United States does not invest the supreme court with any jurisdiction or control over the State or its courts in the administration of its criminal laws, except so far as by writ of error, when a federal question arises, the accused is entitled to take the case from the court of last resort in the state to the supreme court of the United States.

Murder is a common-law offence. The United States have no

common-law jurisdiction in criminal cases; therefore the trial for murder must be in the courts of the State within the territorial jurisdiction of which the crime was committed. In the first proposition we tried to maintain that as the State in the prosecution of the indictment against Reynolds was acting in her character of sovereign, that no United States court, under any circumstances, could take jurisdiction of the case but the supreme court.

The State courts must then remain the sole and exclusive tribunals of trial, subject under the limitation above mentioned, to the right of the accused to a writ of error to the supreme court.

That the State courts, and not the United States courts, are the exclusive tribunals for the trial of crime committed within the State and against the laws of the State, we refer to the following cases: Corfield *vs.* Coryell, 4 Washington's Circuit Court Reports, 371; Ward *vs.* State of Maryland, 12 Wall. 430; The Slaughter-house Cases, 16 Wall. 36, 130; United States *vs.* Cruikshank, 2 Otto, 542.

From what has preceded, we claim, with submission, that Congress has not conferred upon the United States court for the western district of Virginia, held by Judge Rives, the jurisdiction he has assumed and is now exercising. Nor do we think it has attempted to confer the jurisdiction. Judge Rives claims to act by virtue of section 641 of the Revised Statutes of the United States, edition of 1878, page 115. Does this statute confer the jurisdiction? We claim that it does not, nor was it intended to do so. So much of said section as is deemed necessary to the proper understanding of the question now being considered is as follows: "When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest, imprisonment or other trespass or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the

trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next circuit court to be held in the district where it is pending." This section relates to the removal of causes having their origin in the denial of some civil right, and is so declared to be on the margin of the statute. Before a cause can be removed under this section it must be made to appear that some civil right is denied, or cannot be enforced in the tribunals of the State, or in that part of the State where such suit or prosecution is pending, as pointedly laid down by Justice Bradley in delivering the opinion of the court in the case of the State of Texas *vs.* Gaines, 2 Wood's Circuit Court Reports, page 344—

That is to say, there must be,

1st. The denial of rights secured by the first section of the act.

2d. Inability to enforce in the court any of said rights.

The rights here referred to are the rights secured by sections 1977 and 1978 of Revised Statutes, page 347. The sections are as follows:

"All persons within the jurisdiction of the United States shall have the same right in every State and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

"All citizens of the United States shall have the same right in every State and territory, as is enjoyed by white citizens thereof, to inherit, purchase, lease, sell, hold and convey real and personal property."

These two sections confer the civil rights referred to.

The civil rights conferred upon the colored race are the rights enjoyed by white citizens in the States and Territories at the time the law was enacted. Congress did not create any new rights. It merely extended to the colored race rights existing and enjoyed by white citizens, and provided that these rights should not be denied to the colored citizens.

All that the colored citizen can claim is that his rights shall be the same as that of the white citizen, and that he shall be permitted to enforce these rights in the courts.

The right to have a jury of a particular race or color, in whole or in part, to try rights of property or rights of person, is not one of

the rights conferred by the act above referred to. Hardly will it be maintained that a violator of the criminal law of a State can claim as a civil right to be tried by a jury of a particular race or color. The offender would always demand a jury from that race or color which he thought most favorable to him or least likely to punish the offence. Congress cannot be supposed to have enacted a law tending to this result. When crime is committed the perpetrator must be tried according to law, and that law must be the same for all colors and all nationalities. The Indian within the State committing crime cannot demand for his trial a jury of Indians, nor a Chinaman a jury of Chinese, nor an African a jury of Africans, nor an Irishman a jury of Irish. Each has the right to be tried according to law by an impartial jury. Then the right to have a jury of any particular race or color is not a right conferred by Congress under the fourteenth amendment. The State of Virginia has not by her laws denied to any race or color the equal protection of her laws. In reference to jury service her statute is as follows: "All male citizens twenty-one years of age, and not over sixty, who are entitled to vote and hold office under the constitution and laws of this State, shall be liable to serve as jurors, except as hereinafter provided"—Code of 1873, page 1058. The attention of the court is invited to the jury law of the State, which has been printed and filed in this case for the inspection of the court.

In providing juries the judges of the county, corporation and hustings courts are required to select from the qualified voters persons of honesty, intelligence and good demeanor, and suitable in all respects to serve as grand jurors.

This law gives the most perfect equality of right, and in its execution imposes on the judges above mentioned the exercise of a sound discretion in selecting from the body of the people the persons of whom service as jurors will be required. Hundreds and thousands of the most favored class of citizens are never called upon for this service (because the service is rendered by comparatively a few) and yet it was never thought that they were denied any right, or were unable to enforce their rights in the courts by reason of their not serving as jurors.

With much more propriety could it be claimed that civil rights had been denied where *judges* were not taken in equal proportion from all races and colors without reference to previous condition of servi-

tude. We do not believe there is a State in the Union the bench of which is adorned by judges selected from the colored race.

The equality of right is one thing, the rendition of service another. The refusal of Judge Tredway, of the circuit court of Virginia for the county of Patrick, to discharge the venire summoned for the trial of Reynolds upon the motion of the accused and award a new *venire facias* requiring jurors to be summoned because of color, was not a denial of any right secured by the civil rights bill, and, therefore, was not such a case as could be removed from the State court to the circuit court of the United States under section 641, even though the constitutional validity of that section were conceded, and was not a case of which the circuit court of the United States had or could take jurisdiction.

The act of Judge Rives, in taking jurisdiction, and in assuming the custody of the prisoners and depriving the State of that custody, is without authority of law and should be declared null and void.

Now, as to the remedy of the State. We submit that *mandamus* is an appropriate and complete remedy, and the only remedy, as there seems to be no right of appeal or *writ of error* to this court

This court is the proper tribunal to award said writ of *mandamus*. The application is made by and on behalf of the State of Virginia, and the writ is to be directed to a court or judge appointed under the authority of the United States. The 688th section of the judiciary act is as follows: "The supreme court shall have power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction, and *writs of mandamus*, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States, or to persons holding office under the authority of the United States, *where a State*, or an ambassador or other public minister, or consul or vice-consul is a party." (See Revised Statutes, edition of 1878, page 127.)

Supposing the court of Judge Rives to be without jurisdiction, *mandamus* is the remedy to which the State is entitled. Upon this point we beg to make an extract from a paper prepared by Judge William M. Tredway, on the 13th December, 1878. The learned judge says: "Here is a wrong for which there is no remedy, unless it be *mandamus*.

"The writ of *mandamus* is, in general, a command issuing, &c., and

directed to any person or corporation, or inferior court of jurisdiction, &c., requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the court of King's Bench has previously determined, or at least assumed to be consonant to right and justice. * * * But issues in all cases where the party hath a right to have anything done, and hath no other specific means of compelling its performance—Wendell's Black. Com. 3 vol., p. 110 (marginal).

"A *mandamus* is a writ commanding the execution of an act, where otherwise justice would be obstructed, or the King's charter obstructed, issuing regularly, only in cases relating to the public and the government—Bacon's Abr. Mandamus.

"It is now an established remedy and every day made use of, to oblige inferior courts and magistrates to do that justice which they are in duty and by virtue of their office obliged to do—same book, p. 420.

"In many cases the writ was used for restoring or admitting persons to offices and places they were entitled to, and it is said '*mandamuses* have been granted to oblige justices of the peace to discharge prisoners, pursuant to acts of parliament, made for relief of insolvent debtors'—same book, p. 436.

"It was introduced to prevent disorder from a failure of justice and defect of police, therefore it ought to be used upon all occasions where the law has established no specific remedy, and where, in justice and good government, there ought to be one—per Lord Mansfield, Rex *vs.* Barker, Burrows' Rep., p. 1267.

"He also said in this case, which was an application for *mandamus* to compel trustees to admit a minister to possession of a church as a pastor: 'Here is a function with emoluments and no specific legal remedy; the right depends upon election, which interests all the voters. The question is of a nature to influence men's passions, the refusal to try the election in a feigned issue, or to proceed to a new election, proves a determined purpose of violence, should the court deny this remedy; the congregation may be tempted to resist violence by force, a dispute 'who shall preach Christian charity,' may raise implacable feuds and animosities, in breach of the public peace, to the reproach of government and the scandal of religion. To deny this writ would be putting Protestant Dissenters and their religious worship out of the

protection of the law. This case is entitled to that protection, and cannot have it in any other mode than by granting this writ—*Ib.* 1269.

"Under the American system it is still, however, regarded as an extraordinary remedy, in the sense that it is used only in extraordinary cases, and when the usual and ordinary modes of proceeding and forms of remedy are powerless to afford redress to the party aggrieved, and when, without its aid, there would be a failure of justice—High's Ex. Leg. Rem., 8, 9.

"By statute the power is given to the supreme court to issue writs of *mandamus* in cases, warranted by the principles and usages of law, to any court appointed under the authority of the United States, or to persons holding offices under authority of the United States, where the State or ambassador is a party—Sec. 688, R. S. U. S.

"The case of *ex parte* Bradly, 7 Wallace, 365, is conclusive, we think, of our view of the office of *mandamus*, as applicable to the case at hand: 'It was then decided that *mandamus* issues from supreme court to an inferior court, to restore an attorney-at-law disbarred by the latter court, when it had no jurisdiction in the matter, as (*ex. qr.*) for a contempt committed by him before another court.'"

If we succeed in establishing the proposition that Judge Rives' court is without jurisdiction, then it follows, we think, upon well established principles, that *mandamus* is the remedy, and that it must issue from this court. The case of *ex parte* Bradly, and cases there cited, are conclusive upon this point. Mr. Justice Nelson in delivering the opinion of the court in the above case, at page 377, 7 Wallace, says:

"For we agree that this writ does not lie to control the judicial discretion of the judge or court, and hence when the act complained of rested in the exercise of this discretion, the remedy fails.

"But this discretion is not unlimited, for if it be exercised with manifest injustice, the court of king's bench will command its due exercise. It must be a sound discretion and according to law. As said by Chief Justice Taney, in *ex parte* Secombe: 'The power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice, or personal hostility.' And by Chief Justice Marshall, in *ex parte* Burr, 'The court is not inclined to interpose, unless it were in a case where the conduct of the circuit or district court was irregular, or was flagrantly improper.'

"We are not concerned, however, to examine in the present case how far this court would enquire into any irregularities or excesses of the court below in the exercise of its discretion in making the order against the relator, as our decision is not at all dependent upon that question. Whatever views may be entertained concerning it, they are wholly immaterial and unimportant here. The contrary must be maintained before this order can be upheld and the writ of *mandamus* denied. *No amount of judicial discretion of a court can supply a defect or want of jurisdiction in the case.*

"The subject matter is not before it; the proceeding is *coram non judice* and void. Now this want of jurisdiction of the inferior court in a summary proceeding to remove an officer of the court, or disbar an attorney or counsellor, is one of the specific cases in which this writ is the appropriate remedy. We have already seen from the definition and office of it, that it is issued to the inferior courts 'to enforce the due exercise of those judicial or ministerial powers with which the crown or legislature have invested them, and this, not only by restraining their *excesses*, but also by quickening their negligence and obviating their denial of justice.'"

Again, at page 379, the learned justice further remarks: "But the proceeding (that is by *mandamus*) is admitted to be the recognized remedy when the case is outside of the exercise of this discretion, and is one of irregularity, or against law, or of flagrant injustice, or *without jurisdiction.*"

Mr. Justice Miller in delivering a dissenting opinion in the above case, at page 380–1, seems to base his dissent upon the ground that the court below had jurisdiction of the person of Mr. Bradley, and of the offence charged, and that the action of the court was but the exercise of a discretion clearly within the jurisdiction of the court.

In the case now at bar, the circuit court of the United States for the western district of Virginia had no jurisdiction of the State of Virginia, and under the United States constitution could have none, and it had no jurisdiction of the offence charged, to-wit: the murder of Shelton by Reynolds, an offence against the State law. As Mr. David Dudley Field remarked in the very able argument he made in Cruikshank's case: "*The United States cannot punish the violation of State laws, any more than the States can punish the violation of Federal laws.*"

Thus we see that the grounds upon which Mr. Justice Miller based

his dissent in *ex parte* Bradley, are absent in the case we are now considering. There does not seem to be even a colorable jurisdiction. A criminal prosecution is a proceeding directly by the sovereign to punish an offence against its sovereignty. Suppose the trials should proceed in Judge Rives' court and the accused should be convicted. They, or either of them, would have the right to apply for executive clemency. To whom should the application be made? To the President? We think not, for he has no power to pardon for offences against the State. To the Governor? We think not, for he has no power to pardon when the accused has been sentenced by a United States court. If this jurisdiction is sanctioned, Congress ought to declare at once where the pardoning power resides. Condemned men without a pardoning functionary to whom they could apply for clemency, would be a blot upon our civilization.

If the United States courts can intervene and take from the State courts their criminal jurisdiction, would it not be well for congress to provide their jails, their penitentiaries and their gallows in every State?

It is worthy of observation that section 641 gives to any person whatsoever who will allege on oath that he is denied or cannot enforce in the judicial tribunals of a State any right secured to him by any law providing for the equal civil rights of citizens of the United States, the absolute right to remove his case into a circuit court of the United States, section 642 making it the duty of the clerk of the circuit court to issue the writ of *habeas corpus cum causa*, without the order of the judge.

As was said by Mr. Justice Bradley, in Texas *vs.* Gaines, 2 Woods, 344: "If every citizen who is prosecuted in a State court can, on his own allegation, remove his case to the United States courts, it will present a powerful temptation to litigants, especially of the criminal class, and the United States courts will be flooded with cases in which one of the parties imagines, or says, that he cannot have a fair trial in the State courts. We cannot think that this is the true construction of the statute."

If, however, it shall be held that it must be so construed, then we insist that it is unconstitutional and void. It deprives the States of their right to try and punish, in their own courts, offenders against their laws; and confers upon the Federal courts power to try and

punish offenders for crimes which are not, and, under our system of government, cannot be within their jurisdiction.

The judicial power of the United States is defined and limited by the second section of Article III of the constitution. By no latitude of construction can the power thereby conferred be extended to the punishment of offences against the States, and not against the United States.

The inhibitions upon the power of the States contained in the 14th amendment, do not any more than those of the 10th section of Article I of the constitution, confer upon congress the right to take into their hands the administration of the civil or criminal laws of the States as a means of preventing them from violating those inhibitions.

The only way in which the constitutional restraints upon the power of the states can be made effectual by the action of congress, is by providing that acts done in violation of them shall be treated as null, and providing the means of having them so declared, and their operation stayed by the federal judiciary.

This has been effectually provided for by the law granting writs of error from the supreme court of the United States to the State court in cases in which federal questions and rights are involved.

In the cases now under consideration, if the accused were entitled to require that the juries by which they were to be tried should be composed in whole or in part of persons of their own race and color, nothing was easier than for them to take their cases to the supreme court of appeals of Virginia on that point, and upon an adverse decision by that tribunal, to take them to the supreme court of the United States and have the question there decided.

In this way all the rights of the accused would have been completely secured, and the State and her officers held to a due observance of the constitution of the United States and laws made pursuant thereto, without impairing her sovereign rights by depriving her courts of jurisdiction over offences against her laws. The State and Federal courts would thus have moved circumspectly in their appropriate orbits, and the State and Union saved the excitement incident to the conflict between State and Federal judicial authorities.

It is not pretended that the State of Virginia has made or attempted to enforce any law by which the privileges and immunities of citizens of the United States are abridged; or that there is any law of the

State pursuant to which any person is denied "the equal protection of the laws."

On the contrary, Judge Rives, in the opinion delivered by him when he directed the removal of the cases (filed with his answer to the rule), says:

"The State law is not in fault here. Under it all voters are competent jurors, the selection devolving on the county judge, so that no discrimination is made by it on account of color or race. I have endeavored to follow, as closely as practicable, this State law in the selection of my juries at this bar."

If any provision of the fourteenth amendment has been violated in this case, the State did not authorize it. If the act complained of was in conflict with any provision of that amendment, it was also an infraction of the State law, and it is not to be presumed that the error would not be corrected by her own tribunals.

It was therefore manifestly premature to invoke the intervention of the Federal courts until the party supposing himself to be aggrieved had attempted and failed to have the alleged error corrected by the State courts of last resort, when, as hereinbefore indicated, a writ of error might be sued out from the supreme court of the United States.

The fourteenth amendment applies to the States in their corporate capacity; and it is difficult to understand how the act of a judge of an inferior State court, in contravention of the State law, which conforms to that amendment, can be held to be the act of the State. But conceding for argument sake that Judge Rives is right in holding that the act of such judge must be taken to be the act of the State, how does it appear that "the equal protection of the laws" has in this case been denied to the accused?

All they could ask was to be put on the same footing with white persons—that the jury to try them should be constituted in the same manner that it would be for white persons. This they had a right to demand—no more, and no less. There is no law, State or Federal, which gives to persons of either race or color, the right to insist that the juries by which they are to be tried shall be composed, either in whole or in part, of their own race or color. A law so providing would be contrary to the whole spirit of the constitutional amendments, which were designed to put both races on a footing of entire equality under the law. Judge Rives in requiring that persons of color

shall be placed on juries for the trial of persons of color, *makes* the very discrimination between the races which he denounces.

Colored persons as well as white ones have in Virginia a right to be tried by an impartial jury, without distinction of race or color; and if in any case it can be shown that from any cause whatsoever a jury that has been summoned is not impartial it will be set aside and an impartial one selected in its place. The court in which the trial is had must in each case determine whether the jury is or is not impartial, its decision being subject to review, and, if erroneous, to reversal, by the court of appeals. If in any case it can be shown that a person called as a juror, whether from race, color, or other cause, is not impartial, he will be rejected.

A person is as much denied "the equal protection of the laws" when the court errs in overruling an objection made by him to a juror of his own race and color as if it were made to a juror of different race or color. It will hardly be claimed that such an erroneous ruling would give him the right to remove his case for trial to a Federal court. Yet it seems that there would be as much ground for asserting the right in that case as in the case now under consideration, for there is no warrant in fact or in law for the assumption upon which Judge Rives' action is based, that there is an imperative necessity, in order to obtain impartial juries for the trial of colored persons, that they shall be composed in part of persons of their own race and color. A jury composed of the white race only may be fairer and more impartial than a jury thus constituted.

Besides, who is to determine in each case what proportion of the jury shall be of the same race and color with the accused? Must it be one-third, or one-half, or the whole? If the views of Judge Rives are correct, a mistake of the court in failing to allow as many jurors of the race and color of the accused as would be proper in the opinion of the accused, or of the United States circuit judge (if indeed that judge has the power to remand the case), would give the right of removal.

Prejudice against a person charged with murder, very often exists in the county or locality of the murder, without reference to the race or color of the accused, rendering it difficult, if not impossible, to obtain an impartial jury in the county. The law of the State, to meet this difficulty, provides for obtaining a *venire* from a distant county, or of

changing the *venue* and sending the case for trial to a distant county. An application on the part of the accused, to the judge of the circuit court of Patrick, supported by affidavits, would have secured a change of *venue* and a trial in a county unaffected by local prejudice.

In the answer of Judge Rives, at page 20 of printed record, he insists that the provisions of section 641, upon which the jurisdiction of his court depends, were fully complied with, and that the application for removal was not too late. Upon this point he cites the cases of Gordon *vs.* Longest, 16 Peters, 97; and The Insurance Company *vs.* Dunn, 19 Wall. 214.

We do not controvert the proposition that the application for removal was made in time, if it shall be held that the circuit court could properly take jurisdiction of the case. We therefore pass directly to the consideration of Judge Rives' second proposition, to-wit: the constitutionality of the proceeding by removal, and the authorities cited by Judge Rives in its support.

We admit that the remedy by removal is coeval with the judiciary act of 1789, and that it has been sanctioned by the courts and approved by the illustrious statesmen and jurists whose names are given. But we maintain that the remedy is only co-extensive with the right of jurisdiction. The court to which the removal is sought must have a rightful jurisdiction of the case, and did have such jurisdiction in the cases cited by Judge Rives. Neither of them affected in any way the administration of the criminal laws of the State, and to neither of them was a State a party in any respect whatsoever. Of course Mr. Justice Swayne, in The Mayor *vs.* Cooper, could say with emphasis, "We entertain no doubt of the constitutionality of the jurisdiction given by the acts under which this case has arisen." The subject matter of litigation in these suits had no relation to the 14th amendment or the civil rights bill. We therefore insist that these cases are not authorities sustaining the action of Judge Rives.

The third proposition of Judge Rives, at page 21 of printed record, is that section 641 is strictly analogous to the acts thus pronounced constitutional, and that the 14th amendment gives it validity. Upon this proposition depends the question at issue. We deny that the 14th amendment confers the right to a jury of a particular race or color, and the amendment not conferring such a right, section 641 does not authorize a removal merely because such right is claimed and denied.

We have argued this in the former part of our brief, and will not repeat the argument here. We do not think the Slaughter-house cases support or even tend to support the proposition of Judge Rives.

We now come to his fourth and last proposition, to-wit: "That a Federal question arising under the 14th amendment was involved in, and a Federal right invaded by the action of the circuit court of Patrick," &c. In answer to this we respectfully refer the court to a former part of this brief.

JAS. G. FIELD,
Attorney-General of Virginia.

WM. J. ROBERTSON,
Counsel for Virginia.

Acts of Assembly 1877-8
Chap 18- page 330

OF GRAND JURIES.

Grand jury terms in county, corporation, and hustings courts; how many, and how designated.

1. There shall be a regular grand jury at two terms in each year, of the county, corporation, and hustings courts, to be designated by the judges of said courts, and as many special grand juries as may be ordered in the manner hereinafter provided.

Jurors, how selected; list of those selected to be furnished to officer; how jury is summoned.

2. The county, corporation, and hustings judges of each county, city, and town, shall, in the month of August, of each year, select from the qualified voters of said counties, cities, and towns, forty-eight persons of honesty, intelligence, and good demeanor, and suitable in all respects to serve as grand jurors, who shall be the grand jurors for twelve months next thereafter; such jurors shall be selected from the several magisterial districts of the counties and wards of the cities and towns, in proportion to the population thereof, and a list of such jurors shall at once be furnished to the clerk of the court whose judge makes the selection. Whenever a grand jury is ordered by such court, the clerk shall as soon as may be, but not more than twenty days before the jury is wanted, issue a venire facias to the sheriff of the county, or sergeant of the city or town, commanding him to summons of such persons so selected, who are to be named in the writ, the maximum number prescribed for the grand jury ordered to appear at the time directed by the judge or court to serve as grand jurors. No such person shall be required to appear more than once, until all the others have been summoned once, nor more than twice, until the others have been twice summoned, and so on. The clerk in issuing the venire facias shall apportion the grand jurors, as nearly as may be, ratably among the magisterial districts or wards.

Who are qualified, and the number to be summoned.

3. A regular grand jury shall consist of not less than sixteen nor more than twenty-four persons; and a special grand jury of not less than six nor more than nine persons. Each grand juror shall be a citizen of this

e, and of the county or corporation in which the court is to be held, in other respects a qualified juror, and not a constable, ordinary per, overseer of a road, and not the owner or occupier of a grist mill; when the grand juror is for a county court, not an inhabitant of a city own having a corporation or hustings court.

Acts 1877-8 p 340

OF TRIAL AND ITS INCIDENTS.

How juries summoned; fine for not attending; court may order venire at any time for trial.

3. The writ of venire facias in a case of felony, other than where the punishment may be death, shall command the officer to whom it is directed, to summon sixteen persons of his county or corporation, to be taken from a list to be furnished him by the judge of his county or corporation, residing remote from the place where the offence is charged to have been committed, and qualified in other respects to serve as jurors, to attend the court wherein the accused is to be tried, on the first day of the next term thereof, or at such other time as the court or judge may direct. If more than two cases are to be tried at one term of the court, only two juries shall be summoned, unless the court may direct otherwise: and the juries so summoned may be used for the trial of all the cases.

4. In a case where the punishment may be death, the writ of venire facias shall require the officer to summon twenty-four persons, in the manner provided in section three of this chapter; and in any case of felony, where a sufficient number of jurors for the trial of the case cannot be had from those summoned and in attendance, the court may direct another venire facias, and cause to be summoned from the bystanders, or from a list to be furnished by the court, so many persons as may be deemed necessary to complete the jury. If any person summoned under any writ of venire facias authorized by this chapter, fail to attend as required, without sufficient excuse, he shall be fined by the court not less than five nor more than twenty dollars.

5. Any court in which a person accused of felony is to be tried, may at any time cause a venire facias to issue for his trial.

Challenges of jurors; how tried.

6. No challenge of a juror shall be allowed the commonwealth, except for cause; and all challenges shall be tried by the court in which they are made.

7. A person whose opinions are such as to prevent his convicting any one of an offence punishable with death, shall not be allowed to serve as a juror on a trial for such offence.

How panel completed; accused has peremptory challenge; jurors, how paid.

8. In all cases of felony where the punishment cannot be death, the jury shall consist of twelve persons, summoned as aforesaid, and free from exception. From the panel summoned, the accused shall have the peremptory right to strike off four persons. In all cases where the punishment may be death, there shall be selected from the persons summoned, a panel of sixteen persons free from exception, and from this panel the accused may strike four, and the remaining twelve shall constitute the jury; or if the accused does not strike them off, twelve of the panel shall be selected by lot, who shall constitute the jury. All jurors summoned under the provisions of this chapter, shall receive one dollar for each day they attend the court as jurors. If the same person attend as a venireman and as a petit juror on the same day, he shall only receive one compensation.

When juror summoned from another county; pay of jurors; how to be paid.

9. In a criminal case in any court, if qualified jurors, not exempt from serving cannot be conveniently found in the county or corporation in which the trial is to be, the court may cause so many as may be necessary of such jurors to be summoned from any other county or corporation by the sheriff or sergeant thereof, or by its own officer. Every juror so summoned shall be paid one dollar for every day he attends, and the same mileage as a witness in a civil case: and every juror residing in such county or corporation, and serving on such jury, shall be paid in like manner one dollar for each day he attends on such jury. Such jurors, and those mentioned in the preceding section, shall be forthwith paid by the treasurer of the last named county or corporation, and he shall be repaid out of the treasury of the state on the order of the court.

Code of Ver 1873. p 105-8

OF JURIES GENERALLY.

Who liable to serve as jurors.

1. All male citizens twenty-one years of age, and not over sixty, who are entitled to vote and hold office, under the constitution and laws of this state, shall be liable to serve as jurors, except as hereinafter provided.

Who exempted from jury duty.

2. The governor and lieutenant governor of the state, practicing attorneys, licensed practicing physicians, officers of any court, all telegraph operators actually engaged as such in any office in this state, officers and members of the fire department of a city or town, and all persons mentioned in the second and third sections of chapter twenty-second, as exempted from ordinary militia duty (except school commissioners, trustees of free schools, and officers of the militia who resign their commissions after serving seven years successively, and non-commissioned officers and members of volunteer companies), shall be exempted from serving on juries in civil and criminal cases, and the citizens of Tangier, Syxes, and Chincoteague islands, in the county of Accomac, and Hog and Cobb's islands, in the county of Northampton, are hereby exempted from jury service, except service on grand juries.

Juries, how organized and summoned.

3. The judge of each county or corporation court shall, as soon after this act goes into effect as may be, and thereafter annually, at the May or June term of such court, prepare a list of such inhabitants of the county or corporation, not exempt as aforesaid, as he shall think well qualified to serve as jurors, being persons of sound judgment and free from legal exception. Such list shall contain not less than one for every one hundred inhabitants of each township or ward, having regard to the population of the county, so that the whole number of persons selected in the county shall amount at least to one hundred, and not exceeding three hundred.

4. The list so prepared, shall be delivered to the clerk of the court, to be safely kept by him, subject only to the inspection of the judge, as hereinafter prescribed; and to such list the judge may add the names of any persons liable to serve, and to strike therefrom the name of any person who has been convicted of any scandalous offence or been guilty of any gross immorality.

5. When such list is made out, the judge shall cause all the names thereon to be fairly written, each on a separate paper or ballot, and shall fold or roll up the ballots so that the names written thereon shall not be visible on the outside, and to resemble each other as nearly as may be, and shall deposit the ballots in a secure box, prepared for the purpose, which shall be safely kept by the clerk, and shall be opened only by order of the judge, as hereinafter prescribed.

Woolen

RESOLUTIONS

ADOPTED BY THE

GENERAL ASSEMBLY

IN REGARD TO THE

USURPATION OF POWER BY THE FEDERAL JUDICIARY IN VIRGINIA.

Your committee, therefore, report the following resolutions, and recommend their passage:

RESOLUTIONS.

The general assembly of Virginia, relying with a firm trust on the virtue, intelligence and patriotism of the people as the only sure foundation of republican government, and on which the ultimate guarantee of liberty must always rest, invoke the calm and serious consideration *of all the States and all the people thereof*, to the statements and declarations hereinafter set forth; and do appeal to them for their co-operation and assistance in maintaining the principles of free government, and in enforcing remedies under the constitution for the wrongs and injuries herein shown to have been done to the rights of the people, and in preventing a repitition of the same.

They do declare and affirm:

1. That the constitution of the United States is in as full force and vigor as when adopted and ratified.

2. That Virginia in re-entering the Union after the civil war, resumed all her relations to the government of the United States on perfect equality with every other State; and is entitled to the same rights and powers and bound by the same duties and obligations as each other state; and that her citizens are equals in every respect under the constitution with all other citizens of the United States.

3. That the United States can only exercise the powers delegated

to them in the constitution. Within the scope of these powers their government is supreme; beyond them it has no existence. All powers not delegated to them are reserved to the States or to the people, and in the exercise of them the States are sovereign, the two governments together forming one complete whole, and neither can or ought to interfere with the rights or duties of the other.

4. That the preservation of the States and the maintenance of their governments are as much within the design and care of the constitution as the preservation of the Union and the maintenance of the Federal government; and the separate and independent autonomy of the State is necessary to the Union under the constitution.

5. That the essential and fundamental right reserved by the people of the States is to organize each State as a separate and distinct political society, to constitute such government therein as best suits ther will and pleasure, and to change the same whenever their convenience requires it, subject only to the constitution of the United States, and the laws and treaties made in pursuance thereof.

6. That the necessary and inherent condition of this reserved right of local self-government is the right and duty of the State to protect life, liberty and property within her jurisdiction, by laws of her own creation and by officers of her own selection.

7. That the constitution of the United States grants certain powers and imposes consequent duties upon the United States which they are bound to execute and perform; and that the rights reserved to the States impose *on them* certain other functions and duties which *they* are equally bound to execute and perform; and the United States can no more rightfully interfere with and attempt to execute the powers and perform the functions of the State, than the States can those of the United States; and any attempt by either to interfere with the rights of the other will be usurpation, unconstitutional and void.

8. That the United States have only the right to prevent the exercise by the States of powers prohibited to them by the constitution, by pronouncing such forbidden action void, through the judicial power, but in no case can the United States undertake, in any manner, or for any reason whatsoever, to perform any duty which it is incumbent on a State to perform.

9. That, therefore, all acts of the congress, and particularly those known as the civil rights bill, and the enforcement act, which attempt,

or profess to attempt, to provide for the performance by the United States of duties and obligations belonging to States, are unconstitutional and void.

10. That, therefore, the action of the judge of the district court of the United States for the western district of Virginia, in assuming jurisdiction of the cases of Lee Reynolds and Burwell Reynolds, parties charged with crime against the laws of this commonwealth, and held to answer therefor by the circuit court of Patrick county, one of the courts of this commonwealth of competent jurisdiction, and his removal of those parties from the custody of the sheriff of Patrick county, who is the legal custodian of the same, to that of the marshal of the United States, and his proceeding to try the same in the circuit court of the United States for said western district, is an attempt on his part to execute the laws of this commonwealth, to regulate her internal police, in the courts and by the officers of the United States, is unwarranted by the constitution, is destructive of the right of the people of each State to protect life, liberty and property in their own way, by their own courts and officers, and ought at once to be remedied by proper judicial action, and any recurrence of the same prevented by appropriate legislation.

11. That proper provision by law ought to be made for the prompt and effective supervision by the supreme court of the United States of all the proceedings of the judges of the inferior courts of the same, when they deny any right claimed, in any matter before them, under the rights reserved to the States or the people, or the rights guaranteed by the constitution of the United States; and this supervision ought to be exercised by interference before a wrong is done, as well as by appeal after one has been committed.

12. That the Governor is hereby requested to direct the Attorney-General to institute proceedings in the name of this Commonwealth before the supreme court of the United States, and to demand in her name such protection and redress as that tribunal can afford in the premises, to the end that the parties now wrongfully held under the mandate of the judge of the district court of the United States for the western district of Virginia, may be returned to the custody of the officers of this Commonwealth, to be dealt with as her laws direct.

13. That the Governor is hereby requested to transmit copies of these

and he may discharge any panel whenever, in his opinion, they have served a reasonable time. If a person summoned under a writ for

and representatives in congress, in order that they may be laid before their respective houses; and also to the Governor of each State in this Union, with the respectful request that he bring the same to the attention of the general assembly of his State, and the earnest hope that all the States will co-operate and assist us in maintaining our common rights and protecting our common interests.

All of which is respectfully submitted,

BRADLEY T. JOHNSON,
JNO. W. DANIEL,
DAN'L A. GRIMSLEY,
THOS. C. WALSTON,
T. EDWIN BETTS,
JOHN L. HURT,
B. F. BLAND,
CHARLES L. SINCLAIR,
ARCHER A. PHLEGAR,
Special Committee of the Senate.

T. T. FAUNTLEROY, JR.,
JAMES D. JOHNSTON,
JOS. R. ANDERSON,
BENJ. F. DYER,
R. A. COGHILL,
JOHN T. LOVELL,
S. S. SHRIVER,
L. G. HENSON,
CHAS. PITTS,
JOSEPH WALKER.

OFFICE OF CLERK OF HOUSE OF DELEGATES,
AND KEEPER OF THE ROLLS OF VIRGINIA,
Richmond, April 5th 1879.

The foregoing is a copy of resolutions adopted February 8th, 1879, by the ~~Senate and House of Delegates,~~ General Assembly, in regard to the usurpation of power by the Federal judiciary in Virginia.

J. Bell Dyer
Clk & Kpr of Rolls Va

CHAP. 167.—AN ACT to amend and re-enact sections four, five and nine of chapter two hundred and two of the Code of Virginia, edition of eighteen hundred and seventy-three, as amended by an act approved January fifteenth, eighteen hundred and seventy-five, in regard to juries in criminal cases.

Approved March 27, 1876.

1. Be it enacted by the general assembly of Virginia, That sections four and nine of chapter two hundred and two of the Code of Virginia, and section five of chapter two hundred and two of the Code of of Virginia, as amended by an act approved January the fifteenth, eighteen hundred and seventy-five, be amended and re-enacted so as to read as follows:

§ 4. The clerk of the court wherein the trial of persons accused of felony is to be had, shall, as soon as may be, issue a venire facias, directed to the proper officer of the court, requiriug him to summon jurors therefor.

§ 5. The writ shall command the officer charged with its execution to summon thirty-six persons of his county or corporation, to be drawn from the lists provided for in section three of chapter one hundred and fifty-eight of the Code of Virginia (edition of eighteen hundred and seventy-three), to attend the court wherein any such trial is to be had, on the first day of the next term of said court, or at such other time as the court may direct; and from such list of jurors so summoned and in attendance, a jury shall be empanelled for the trial of any and every case ready for trial at that term of the court: provided, that if there be only one felony case on the docket at the time of issuing the writ, the writ shall command the officer to summon only twenty-four persons: and provided further, that the judge of any court may, if he deem it expedient, direct the clerk of his court to issue a separate venire facias for jurors as hereinbefore provided for, each week during which the term of his court will, in his opinion, continue; and he may discharge any panel whenever, in his opinion, they have served a reasonable time. If a person summoned under a writ for

the trial of any criminal case, fail to attend as required, without sufficient cause, he shall be fined by the court not less than five dollars nor more than twenty dollars.

§ 9. When any jurors summoned under a writ of venire facias fail to attend, or are challenged for cause, the court shall cause other jurors of like qualifications to be summoned in the county or corporation, from a list to be furnished by the judge presiding at the time; but if the whole array be challenged, the court shall cause to be summoned thirty-six other jurors of like qualifications, to be drawn from the list mentioned in the fifth section of this chapter, until a panel of sixteen jurors, free from exception, be completed. The accused shall have a peremptory challenge as to four of the panel, and the remaining twelve shall constitute the jury for the trial of the case; but should the accused fail to strike from the panel any, or less than four of the names thereon, then the jury for the trial shall be composed of twelve of those not so stricken off, to be selected by lot.

2. This act shall be in force from its passage.

93 U.S. 18 Hearder

IN THE

Ex parte Jenkins 2 Wade, Jr.

Supreme Court of the United States.

Ex parte Robinson 6 McLean
Ex parte Chung 3 How
5 Pet 190
7 Wall. 377
9 Wheat. 530
1 Wall 69
Phillips Pr. 230

COMMONWEALTH OF VIRGINIA,
vs.
ALEXANDER RIVES.

Moses on Mandamus 18

6 Wheat 267

Points and Argument in opposition to application for Mandamus.

W. Willoughby of Counsel.

19 Wall 505
19 How. 13
17 Wall

12 Allen 214
7 Wall. 571

ALEXANDRIA, VA.
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IN THE

Supreme Court of the United States.

COMMONWEALTH OF VIRGINIA,
vs.
ALEXANDER RIVES.

Points of Argument of W. Willoughby of Counsel in opposition to application for Mandamus.

This case shows the following facts:

Two colored men, Burwell and Lee Reynolds, brothers, were indicted for murder in the county of Patrick, Virginia. Upon being arraigned for trial in April, 1878, in the Circuit Court of the state held for that county, they asked that they be allowed a trial by a jury constituted in part of their own race and color; the jury then summoned for their trial being composed exclusively of white men. This was denied to them, whereupon they filed in said court *before their trial* a petition for the removal of their cases for trial to the Circuit Court of the United States for that district, alleging in their petition, among other things, "that the right secured to them by the law, providing for the equal civil rights of all the citizens of the United States, is denied to them in the judicial tribunals of the county of Patrick of which county they are natives and citizens." (p. 7.) These words, it will be observed, are the substantial language of those which describe the ground of removal in section 641 of the Revised Statutes of the United States.

Such petition further alleged that the grand jury which indicted them, as well as the jury empannelled for their trial, was exclusively composed of the white race, that they had applied for a jury composed

in part of competent jurors of their own race and color, that a strong prejudice existed against them simply on the ground that they were colored, for which reason they did not believe that they could obtain an impartial trial by a jury of white men.

They further allege that their race have never been allowed either in civil or criminal cases, in the county of Patrick, the right to serve as jurors in any case, civil or criminal, in which their race have been interested.

Notwithstanding the filing of this petition, the court disregarded it and compelled the trial of the cases, the result being in one case, the disagreement of the jury; and in the other, a conviction of manslaughter and a sentence of eighteen years in the penitentiary of the state.

Thereupon the prisoners presented to the Circuit Court of the Western District of Virginia, their petition for a writ of *habeas corpus cum causa* accompanied by the record of the proceedings in the state court including this petition (p. 22.) upon which an order was made by the United States Court, in substance as follows:

"The court being of opinion that said petitioners have been denied such a trial as is secured to them by the laws of this state, by competent jurors without distinction of race or color, doth direct said cause upon the petition aforesaid to be docketed in this court for trial," "and further that such writ of *habeas corpus cum causa* issue," &c., (p. 22.)

This writ was issued, and executed by the marshal, and the prisoners are now held under the authority of the Circuit Court of the United States for trial.

This is the present condition of the case in the Circuit Court of the United States.

The Commonwealth of Virginia has never appeared in such court. It has not made any motion to remand the cause to the state court, nor has any application been made in any manner, for a revocation of the order of the court, nor any attempt made therein to controvert any of the facts presented as the foundation of such order.

The Commonwealth of Virginia, ignoring this order of the court, have invoked the original jurisdiction of this court by an application for a writ of mandamus upon Judge Rives of the Circuit Court of the United States, "commanding him to cause to be redelivered by the marshal of said district, to the jailor of Patrick County, the bodies of the said Lee and Burwell Reynolds, to be dealt with according to the laws of the said commonwealth."

To the petition for such mandamus a return has been made by Judge Rives, setting forth substantially the above facts, and alleging,

among other things, at page 21 ; "The record attests that these parties were denied trial by a jury legal under the laws of this State and without discrimination of race."

The denial of the application of the prisoners for a jury composed partly of their own color was placed upon the following ground:

"That the court had no authority to change the *venire*, it appearing to the satisfaction of the court that the said *venire* had been regularly drawn from the jury-box according to law." (p. 7.)

The law of Virginia upon this subject is as follows:

"The writ of *venire facias* in the case of felony, other than where the punishment may be death, shall command the officer to whom it is directed to summon sixteen persons of his county or corporation, *to be taken from a list to be furnished him by the judge of his county or corporation*, residing remote from the place where the offence is charged to have been committed, and qualified in other respects to serve as jurors, &c." (Sec. 3, ch. 17, Criminal Procedure.)

"In a case where the punishment may be death, the writ of *venire facias* shall require the officer to summon twenty-four persons, in the manner prescribed in the third section of this chapter," &c. (Id., sec. 4.)

It will thus be seen that by the laws of Virginia the selection of jurors in cases of felonies is committed to the discretion of the judge of the county or corporation. He makes up the list from whom the jurors must be taken. It is in his power to make a discrimination against the colored race, and it will not be denied that in the courts of the State of Virginia this discrimination is almost universal. As the record in this case shows, in the county of Patrick, where, as may be seen by the census, about one-third of the population are colored, no colored man was ever known to sit upon a jury in a case of this kind, or in any case of felony, and, as held by the State court in this case, that there was no power under the laws of Virginia to correct any error arising from such discrimination.

It is proper to here observe that the fact that one of these prisoners was convicted *before the application for a writ was made to the United States court* was no objection to the jurisdiction of the United States court any more than it would have been if made before any trial in the State court, for the petition for a removal was filed in the State court *before any trial*, and the section of the Revised Statutes (641,) under which the petition was filed directs that "upon the filing of such petition all further proceedings in the State courts shall cease," &c.

All the proceedings of the State court subsequent to this, are, if the petition is properly filed under this law, and the law itself is a valid one, *coram non judice* and utterly void.

In the case of Gordon *vs.* Longest, (16 Peters, 97,) which was a removal under a law in terms similar to those of this act, this Court says that after the filing of the petition "every step subsequently taken, whether in the same court or in the Court of Appeals, was *coram non judice.*"

In Insurance Company *vs.* Dunn, (19 Wall, 214,) in a similar case, the court say: "The conditions prescribed having been complied with, the act of Congress expressly required the State court to proceed no further in the suit. The further proceedings of the common pleas was a clear case of usurped jurisdiction. The illegality was gross."

In asking this court to consider the questions presented by the facts before it, there is suggested first the question of jurisdiction. It would be desirable by persons having a general interest in the decision of these questions, that such an obstacle should not be interposed, but representing as I do, persons having an intense personal interest in defeating this application for a mandamus, I do not feel justified in passing by this objection.

This case comes before this court as an original cause. The Commonwealth of Virginia has never appeared in the Circuit Court of the United States. It refuses to make itself a party to the proceeding there. This application cannot, therefore, be considered as anything in the nature of an appellate proceeding from any action of the Circuit Court. The case pending there is not in any way brought here by any of the modes providing for a review of the action of the Circuit Court as was done in the case of Tennessee *vs.* Davis, now pending here. An original, independent cause of action, is set forth, complaining, it is true, of the action of the court, but not in any way recognized as an appellate proceeding, no more than would be a bill for an injunction to restrain a party from proceeding upon a judgment at law.

No attempt was made in the Circuit Court to controvert the facts upon which its jurisdiction was based, no motion made to remand the cause, no appearance by the party, but it is sought to correct the alleged error of the court in some way different from that provided for the correction of errors by the statutes, by invoking the original, rather that the appellate powers of this Court.

Now it may be that in a case of this kind, a State may invoke the

original jurisdiction of this court. But if it may, it is not because it is a State merely, but because of the character of the cause. It is not a controversy between States, nor between a State and citizens of another state, nor between a State and foreign States, citizens, or subjects. It is not one of those enumerated cases to which the judicial power of the United States extends. It is a controversy between a State, and its own citizen or citizens, and, therefore, it may call upon the judicial power of the United States, not simply because it is a state, but because it is a case arising under the constitution and laws of the United States. Now in looking at sec. 2, of art. 3, of the constitution in which it says that the Supreme Court shall have original jurisdiction in cases in which a State shall be a party, the inquiry might be made whether it did not have reference to those cases which, in the preceding clause, were described as cases to which a State might be a party. But the Judiciary act early provided, as may now be found in section 687 of the Revised Statutes that, "the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party *except between a state and its citizens* or between a State and citizens of other States, or aliens, in which latter cases it shall have original, *but not exclusive* jurisdiction." While therefore it may be that in some cases of this character the Supreme Court may have original jurisdiction, *yet it is not exclusive, and other courts may also have jurisdiction.* There is no constitutional difficulty in investing an inferior court with jurisdiction where a State is a party when the jurisdiction depends upon the nature of the cause *and therefore no constitutional reason why the state should not have appeared in the court below*, sought its remedies there in the first instance, and if aggrieved, invoked the appellate powers of this Court, by mandamus if it had a proper case for such remedy.

In Cohens *vs.* Virginia, 6 Wheaton, at page 393, the Court say:

"If a State be a party, the jurisdiction of this court is original, if the case arise under the constitution or law, the jurisdiction is appellate. But a case to which a State is a party, may arise under the constitution or a law of the United States. What rule is applicable to such a case?

* * *

"In one description of cases the jurisdiction of the court is founded entirely on the character of the parties, and the nature of the controversy is not contemplated by the Constitution. The character of the parties is everything, the nature of the case nothing. In the other description of cases the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the Constitution. When, then, the Constitution declares the jurisdiction in cases where a State shall be a party to be original and in all cases

arising under a law or the Constitution to be appellate, the conclusion seems to be irresistible, that its framers designed to include in the first class those cases in which jurisdiction is given because a State is a party, and to include in the second those in which jurisdiction is given because the case arises under the Constitution or a law."

* * * "The original jurisdiction of the Supreme Court in cases where a State is a party refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and *an original suit might be brought in any of the Federal courts*—not to those cases in which an *original* suit might not be instituted in a Federal court. Of the last description is every case between a State and its citizens, and, perhaps, every case in which a State is enforcing its penal laws. In such cases, therefore, the Supreme Court cannot take original jurisdiction."

In other words, a State cannot institute an *original* suit in *any* Federal court in a controversy between itself and its own citizens, and therefore cannot in the Supreme Court.

It may come into a Federal court where there is a removal from a State court, which is a sort of appellate proceeding, as was done in the case of Tennessee *vs.* Davis, now in this Court, and then it can call upon the appellate powers of this Court, or the appellate powers may be exercised upon a writ of error to the highest court of the State, as was done in the case of Cohens *vs.* Virginia.

Now, a mandamus is in the nature of an appellate proceeding *when applied to inferior courts.* It is a supervisory power over those courts.

In the case of Marbury *vs.* Madison, (1 Cranch, 175,) in which this Court held that the thirteenth section of the Judiciary act, so far as it declared the power of this Court to issue a writ of mandamus to a person holding office under the Constitution, was unconstitutional, decided upon the ground, however, that an individual could not invoke the original powers of this Court, and that a mandamus to an officer was not a revisory or appellate proceeding, the Court say: "To enable this Court to issue a mandamus it must be shown to be an exercise of appellate jurisdiction or to be necessary to enable them to exercise appellate jurisdiction."

"It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the Legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true; yet the jurisdiction must be appellate—not original."

"It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not

create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper is in effect the same as to sustain an original action for that paper, and therefore seems not to belong to appellate, but original jurisdiction."

"In those cases in which original jurisdiction is given to the Supreme Court the judicial powers of the United States cannot be exercised in its appellate form. In every *other* case the power is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct." (Osborn *vs.* Bank of United States, 9 Wh., 120.)

"A mandamus to an officer is held to be the exercise of original jurisdiction, but a mandamus to an inferior court of the United States is in the nature of appellate jurisdiction." (*Ex parte* Crane, 5 Peters, 193.)

As, therefore, a mandamus to a court is in the nature of a supervisory or appellate proceeding, a State, like any other party, should connect itself with the cause pending in the inferior court, as it may do, and then ask the supervision of this Court, in the modes provided for the exercise of appellate powers over such courts, by writ of error, mandamus, or otherwise, according to the nature of its complaint.

There is no case before this Court except that which is made by the petition and answer. No record or part of the record has been sent or certified here by the inferior court. Neither of the parties having an interest in the cause are here upon the record. They have had no citation to appear here, nor any judicial notice of this proceeding. Have they not the right to be heard in some way?

It may be urged that the State would have no redress for the correction of the errors of the Circuit Court. But it would have the same redress that other parties have, and if the appellate or supervisory power, does not extend to the correction of all errors it is one of those misfortunes to which all others litigating in that court are subject, and which can be remedied by legislation, but *only* by this means. It is not a valid objection to the jurisdiction of a court that there is no right of appeal. A person may be erroneously convicted of murder by a Circuit Court and sentenced to death without any right of appeal. Yet this has never been supposed to be a valid objection to its jurisdiction.

The subject-matter of this controversy is simply the abstract one of jurisdiction. The complaint is an invasion by Judge Rives of the sovereign rights of the State. It is, in fact, a controversy between the

State on the one hand and the United States on the other. It is purely and simply a question of State rights. If the wrongful invasion of the sovereignty of the State is an injury capable of redress by a court, so also would be the wrongful interference of the jurisdiction of the United States. The contest here is, which has jurisdiction to try these prisoners, the State or the United States, and the United States has as much interest in the matter as the State.

But the United States is not a party, and could not be a party, to an original cause in this Court, and this case, as now presented, is an indirect mode of seeking the judgment of this Court upon a question in which the United States has at least as deep an interest as the State, when neither it nor any person having the slightest interest in the result is a party to this proceeding. The question is a purely political one.

"The acts of Congress give the right of revision only in those cases where the rights of property are concerned, and where the matter in dispute has a known and certain value, which can be proved and calculated in the ordinary mode of business transactions."

Berry *vs.* Mercier, 5 How., 119.

In Georgia *vs.* Stanton, 6 Wall., 77, the bill was dismissed because—

"No case of private rights or private property infringed, or in danger of actual or threatened infringment, was presented by the bill in a judicial form for the judgment of the Court."

It was a call for the judgment of the Court upon political questions, "rights of sovereignty," "political jurisdiction," &c.

Now, if an executive officer cannot at the instance of a State be restrained from interfering with the jurisdiction of a State, why should a judicial officer be restrained from doing the same thing when no private rights or rights of property are concerned?

In this case, as in the case of Georgia *vs.* Stanton, the sole question is as to the sovereign rights of a State, or rather, as to the sovereign rights of both the State and the United States, for as much as the sovereignty of one may be enlarged, just so much is that of the other restricted.

Another difficulty is also suggested.

The writ of mandamus asked for, is not one simply to put in motion the wheels of the machinery of the court below. It is that the judge shall make a certain order in the cause. It prescribes what that order shall be, to wit: One revoking a judgment that has already been made by the court; not one to assume jurisdiction of a cause, and proceed therein, but to divest itself of all jurisdiction. It proceeds upon the

theory that the court has no jurisdiction, and yet requires the judge, as judge of the court, to make an order in the cause, for certainly an order by him as a person only, could have no force whatever. On this point see

Judges of Oneida *vs.* The People, 18 Wend., 79, 92.
People *vs.* Judges of Duchess Co., 20 Wend., 658.
United States *vs.* Lawrence, 3 Dallas, 42.
Ex parte Sawyer, 21 Wall., 238.
Ex parte Cutting, 94 U. S.

But, if these objections are not considered valid, let us pass to the consideration of the merits of the case. And first, I again recall the attention of the court to the fact that no motion was made in the Court below to remand the cause, as is provided in the act of March 3d, 1875, section 5, 18 U. S. Statutes-at-Large, which provides for such motion in all cases of removal from State to Federal courts, and no attempt was made there to controvert the facts. So that the matters set forth in the petition for removal, and the accompanying record are here to be taken as true. They could not be contradicted here, especially as the parties whose direct interests are involved, are not parties to this proceeding, and have had no opportunity to meet any such contradiction either there or here. If the jurisdiction of the Circuit Court depended upon any question of fact, surely a mandamus would not lie to require any particular decision upon such question.

The precise point of complaint, as shown by the petition and the accompanying record, is *that* the petitioners *were denied a jury constituted without discrimination against the race and color to which they belonged.*

The petition is drawn, it will be observed, in as nearly as could be, the literal language of the statute, section 641 Revised Statutes of the United States. It sets forth the grounds of the required action in the substantial language of the statute which provides:

"When any civil suit or *criminal prosecution* is commenced in any State court for any cause whatsoever against any person who is denied, or *cannot enforce*, in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, *any right secured to him by any law providing for the equal civil rights of citizens of the United States or of all persons within the jurisdiction of the United States* * * * such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts, and verified by oath, be removed for trial into the next Circuit Court to be held in

the district where it is pending. Upon the filing of such petition, all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided."

Section 642 provides for the issuing of a writ of *habeas corpus cum causa*, to be issued by the Circuit Court upon the above state of facts, where the defendant is in the custody of the State court under its process.

Articles four and five of the fourteenth amendment to the Constitution provide:—

"Nor shall any State deny to any person within its jurisdiction the equal protection of the laws."

"The Congress shall have power to enforce by appropriate legislation the provisions of this article."

An act of Congress of March 3, 1875, 18 Statutes-at-Large, p. 335, provides:—

"That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States *or of any State* on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars."

Section 722 of the Revised Statutes of the United States provides:—

"The jurisdiction in civil and criminal matters conferred on the District and Circuit Courts by the provisions of this title, and of title "Civil Rights," and of title "Crimes," for the protection of all persons in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the said cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty."

It would seem, therefore, from the petition and the accompanying record, and these acts of Congress, that *prima facie*, at least, the Circuit Court of the United States had jurisdiction of these cases, and that the course and manner of their trial is prescribed.

This *prima facie* case is, however, sought to be overthrown by the following objections which it is proper for us to consider. I do not know what will be relied upon here, as I have not in the preparation of this brief, seen any briefs of counsel for the petitioner, but I have seen the objections made by the report of the Attorney General of Virginia to the Governor, and by the special committee of the Senate and the Committee on Federal Relations of the House of Delegates of Virginia.

It is said that a negro jury, either in whole or in part, is not one of those rights enumerated in the civil rights bill, as found in section 1977 of Revised Statutes. True, but we are not confined to that. We rely upon the Constitution, the highest "law" and the acts I have quoted.

Certainly the act of March 3, 1875, above quoted, requires that there shall be no disqualification for service as a juror, on the ground of color or race. Every person has a right to a trial by *a jury constituted without discrimination against his own race or color* under this amendment, and under this act. It is not for a negro jury that we are contending, nor is our specific claim that negroes shall constitute a part of the jury. It is simply that the jury should be empannelled without discrimination against the race of the accused.

Again, the objection is made that negroes have the same juries as white men, and that they therefore have equal civil rights with them. Let us see how this is. *White men may have a jury of their own race and color, negroes can not.* In this case the man who was killed, was a white man of the same race and color as the jury, and of a different race and color from the accused. Under the system of juries permitted by the State, such a thing could not occur in a case of a white man charged with crime.

Suppose the case to be reversed, that a white man is charged with the murder of a negro, it may be, as often happens, under circumstances calculated to excite the prejudice of race against race, that a negro is a person who has charge of the selection of juries, and that he thereupon proceeds to make up a list entirely of negroes, discriminating against the white race. Would this be considered equal and fair? Does not such an illustration show that a discrimination in the selection of juries on account of race or color, is a denial of the "equal protection of the laws?" By this system, white men and negroes are not equally treated. One has a jury of his own race; the other does not. One cannot be

subject to the prejudice against him on account of his race or color; the other may be. It was just this discrimination which the fourteenth amendment was designed to prevent.

But it is argued that a State may prescribe the qualifications of its own jurors, as for example, that only men or adults may be allowed upon a jury, or only freeholders, &c., and that in such cases, a woman might as well complain that a discrimination is made against her sex, or an infant, that a discrimination is made against infants, or one without property, that none of his class could sit upon the jury for the trial of his cause.

But this argument ignores the principles upon which the fourteenth amendment was based. That was directed to discriminations on account of race and color, and not to discriminations based upon such distinctions as had no reference to race or color, or perhaps to citizens of the United States not citizens of the State. This is clearly shown in the decision of the court in the Slaughter House Cases. 16 Wall. The court say:

"An examination of the history of the causes which led to the adoption of the 13th, and 14th, amendments, and of the amendments themselves, demonstrates that the main purpose of all the three last amendments, was the freedom of the African race, the security and perpetuation of that freedom, and their protection from the oppressions of the white men who had formerly held them in slavery. In giving construction to any of these articles, it is necessary to keep this main purpose steadily in view."

At page 81 the Court say: "Nor shall any State deny to any person within its jurisdiction the equal protection of the laws.

"In the light of the history of these amendments and the pervading purpose of them, which we have already discussed, it is not difficult to give a meaning to this clause.

"The existence of laws in the States where the newly emancipated negroes resided which discriminated with gross injustice and hardship against them as a class was the evil to be remedied by this clause, and by it such laws are forbidden.

"If, however, the States did not conform their laws to its requirements, then, by the fifth section of the article of amendment, Congress was authorized to enforce it by suitable legislation. We doubt very much whether any action of a State not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision. It is so clearly a provision for that race and that emergency that a strong case

would be necessary for its application to any other. But as it is a State that is to be dealt with, and not alone the validity of its laws, we may safely leave that matter until Congress shall have exercised its power, or some case of State oppression, *by denial of equal justice in its courts*, shall have claimed a decision at our hands."

In the Slaughter House cases it was attempted to extend the protection of the fourteenth amendment to discriminations made, or charged to have been made, between the citizens of the State, as such, upon other grounds than those of race, color, or previous condition of servitude. But the Court say that the ordinary fundamental rights of citizens, as citizens of the State, are alone under the protection of the State. Sovereignty, for this purpose, rests alone with the States. But where some right pertains to a person as a citizen of the United States—making a distinction between a citizen of the State and a citizen of the United States—or where the rights of any *person* depends upon the Constitution and upon this amendment, then that right can be enforced and protected by appropriate legislation.

Justice Field, in his dissenting opinion, and as restated by him in Bartemeyer *vs.* Iowa, (18 Wall., 129,) thought that the protection of the fourteenth amendment extended much farther, and was designed to protect from partial discrimination in regard to, and from the abridgment of those fundamental rights which belong to the citizens of all free governments, growing out of not only a jealousy and dislike towards the colored race, but towards citizens of the North settling in the Southern States, and towards those who had been loyal to the Government during the late rebellion.

But this view was not adopted by the Court, and the distinction was taken upon which we rely, and which it seems to me preserves to the full extent the sovereignty of the States, except in those cases in which they refuse to comply with the requirements of the Constitution and this amendment, or permit a refusal to be made by persons charged with the execution of its laws, and it is in just such a case, and only such, that the power of the United States interposes and supplies the remedy for the failure of the citizen to enjoy the full protection of the right conferred or which is dependent upon the Constitution.

This doctrine is clearly stated in the case of United States *vs.* Reese, 92 U. S. At page 217 the Chief Justice says:

"Rights and immunities created by, or dependent upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, may provide. These may be varied to meet the necessities of the particular right to be protected."

The constitutional right conferred by the fifteenth amendment is, "exemption from *discrimination* in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, may be enforced by appropriate legislation."

In this case the Court say that it would have been within the constitutional power of Congress to legislate for the protection of that right *even at State elections,* but the acts not being confined to such unlawful discriminations, though, perhaps, its general terms were broad enough to cover such a case, and being a penal act, it was held that Congress had not provided the appropriate legislation for such a case. The Court say, at page 218:

"It is only when the wrongful refusal at the State election is *because* of race, color, or previous condition of servitude, that Congress can interpose and provide for its punishment."

Again, in the United States *vs.* Cruikshank, 92 United States, at page 554, the court say:

"The fourteenth amendment prohibits a State from denying to any person within its jurisdiction, the equal protection of its laws, but this provision does not add anything to the rights which one citizen has under the constitution, against another.

The equality of the rights of citizens is a principle of republicanism. Every republican government is in duty bound to protect all its citizens in the enjoyment of this principle, if within its power. That duty was originally assumed by the States, and it still remains there. The only obligation resting upon the United States is to see that the States *do not deny this right. This the amendment guarantees,* but no more. The power of the government is limited to *the enforcement of this guaranty.*"

While, therefore, the duty of extending to all persons within the State, the *equal* protection of its laws was originally assumed by the States and still remains there, yet, if it *does* deny or permit a denial of this *right of equality, if such inequality is based upon the ground of color or race,* then the power of the United States may enforce this guaranty of equality to the the extent that it is denied.

Surely the doctrine we contend for with the limitations put upon it by the majority of the court, in the Slaughter House cases, is not so very dangerous or alarming as has been urged. There is nothing in this to so greatly excite the executive and legislative authorities of the State. This does not threaten to bring about the universal destruction of the sovereignty of the States, to establish the despotism of a centralized power upon their ruins, to result in the existence of the States at the mere will and pleasure of the United States, and to demolish and

annihilate the independent autonomy of the States. This is not a surrender, of the whole police power of the State to the "arbitrary power and fanatical or partizan views of a federal judge." No such fearful consequences need be apprehended. So far as our claim under this amendment is concerned, sovereignty for all purposes, except in regard to the *equal protection of the laws*, which the court says is a principle of every republican government, is fully preserved to the States. Let the State protect this right as all admit it is in duty bound to do, and there can be no interference whatever; if it does not, then the interference can be only so far as to *protect this right* by appropriate legislation. The sovereignty of the State for this purpose, and for this alone, was under this clause surrendered to the General Government and however distasteful it may be, it is an obligation of the State assumed by it, and should be fulfilled with the most scrupulous regard to the dictates of honor and good faith, and all will be well.

The objection is made that if there was any discrimination on the ground of race or color it was not the act of the State; it was not a denial of equality of rights by any law of the State, and that the prohibition extends only to the State.

But as this case shows, the discrimination was made by an officer charged with the execution of a law of the State. The State court decided that this action of the officer was authorized by the law of the State, and therefore that such action could not invalidate the *venire*. In other words, the judiciary of the State decided that this discrimination could be made, and that it could not under the law furnish any remedy, and *therefore* denied the request for a jury made up without discrimination on account of race or color. The motion was overruled, as stated by the court, (p. 7,) "upon the ground that the court had no authority to change the venire, it appearing to the satisfaction of the court that the said venire had been regularly drawn from the jury-box according to law."

The discrimination was made. It was done under the authority of a law of the State, as the State court itself decided. The denial of "the equal protection of the laws" was made as the result of the authority conferred by the law of Virginia. True, the law does not, in terms, *direct* it, but it permits it, and makes action under such permission lawful. If the State does not, by positive direction, violate the right to equal protection, it denies protection against its violation by its officers or other persons. A refusal to provide for the equal protection of persons is certainly equivalent to a denial of such protection.

In some way or other this discrimination is nearly, if not quite, universal in the courts of the State throughout Virginia. This state of things exists under the operation of the laws of the State. If this discrimination in the selection of juries results from the evasion of the obligation of the Constitution by the judges to whose discretion the matter is submitted, and this result becomes notorious, and no attempt is made to correct it by the State, can it be consistently said that the State is carrying out the requirements of the fourteenth amendment with the utmost good faith? Let those having charge of the making and the execution of the laws see to it that in this respect there be not grounds of suspicion even of any dereliction in this respect. The State cannot afford it, nor can those representing it afford to argue here that if what is here charged to be a discrimination on account of color or race is so, the State is not responsible for it.

In this case the court was a court of the State, the commonwealth's attorney represented the State, the State itself was the *prosecutor and the actor in the suit.* In the extract we have made from the opinion in the Slaughter House cases the Court speak, impliedly at least, as a matter proper for their decision—"Some case of State oppression by denial of equal justice in its courts." The law under which the petition for removal was filed permits it when the person "is denied or *cannot enforce* in the judicial tribunals of the State, or in the *part of the State* wherein such suit or prosecution is pending, the right," &c.

The following is the eighth resolution passed by the General Assembly of Virginia in reference to this case:

"That the United States have only the right to prevent the exercise by the States of powers prohibited to them by the Constitution, by pronouncing such forbidden action void *through the judicial power*, but in no case can the United States undertake, in any manner, or for any reason whatsoever, to perform any duty which it is incumbent on a State to perform."

In the report of the joint committee it is elaborately argued that in such cases the power of the United States is only a power of negation, of judicial veto, (p. 15 of report.) This, it is argued, exhausts the power of the United States, and no positive enactment can be allowed to enforce the guarantees of the Constitution. It is claimed that there is "no power conferred upon the United States to perform a duty imposed on a State by the Constitution, for the State that neglects and refuses to do it herself, quoting for that purpose Ken-

tucky *vs.* Dennison, (24 How., 107,) which was a case of mandamus upon the Governor to deliver up a fugitive from justice, and in no case can the United States exercise a coercive power upon the State or any of its departments (p. 19,) and can only operate upon citizens within the limits of its reserved powers, and not on States, (p. 15;) that the power of enforcement is limited to the correction of erroneous decisions of the State courts, by writ of error or appeal.

To what an impotent condition does this reduce the General Government! How completely does this emasculate these vigorous amendments! The poor colored man has the right to take his case through all the courts, and finally to this Court! And this is the protection promised! And when he gets a decision in his favor it results only in declaring the law void! There is no power of positive enforcement!

Some such ground was taken by Virginia in the case of Martin *vs.* Hunter's lessee, (1 Wh.,) where the Court of Appeals declined to be bound by the mandate of this Court, and in which this whole doctrine was denied by this Court. At page 343 the Court say: It has been argued that the Constitution "was never designed to act upon State sovereignties, but only upon the people, and that if the power exists it will materially impair the sovereignty of the States and the independence of their courts. We cannot yield to the force of this reasoning; it assumes principles which we cannot admit, and draws conclusions to which we do not yield our assent."

Let us see what has been the opinion of this Court in an analagous case:

Article 4, section 5, subdi. 3 of the Constitution provides as follows:

"No person held to service or labor in one State under the laws thereof, escaping into another State, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due."

In Prigg *vs.* Pennsylvania, (16 Peters, 539,) legislation in enforcement of this provision by Congress was held to be not only valid, but that it made void all legislation by the State upon the subject, and that it was the exclusive province of Congress to legislate for its enforcement; and in Ableman *vs.* Booth, (21 How., 506,) the fugitive slave law, having for its object the enforcement of this provision, was adjudged to be constitutional in all respects.

The object of this provision was to protect the interests of slavery and the slaveholder, and to show how, in a case involving the protection of these interests, this Court regarded such propositions as are argued here, let me quote from the syllabus in the case of Prigg *vs.* Pennsylvania:

"The clause in the Constitution of the United States relating to fugitives from labor manifestly contemplates the existence of a positive unqualified right on the part of the owner of the slave which no State law or regulation can in any way qualify, regulate, control, or restrain."

"It cannot well be doubted that the Constitution requires the delivery of the fugitive on the claim of the master; and the natural inference certainly is that the National Government is clothed with the appropriate authority and functions to enforce it. The fundamental principle applicable to all cases of this sort would seem to be, that where the end is required the means are given, and where the duty is enjoined the ability to perform it is contemplated to exist on the part of the functionaries to whom it is entrusted."

"The natural, if not the necessary, conclusion is, that the National Government, in the absence of all positive provisions to the contrary, is bound, through its own proper departments, legislative, executive, or judicial, as the case may require, to carry into effect all the right and duties imposed upon it by the Constitution."

I commend the study of this case to those who now, when a construction is sought in the interests of liberty and freedom, seek to deny the efficient power of the Government to enforce the guarantees expressed in the fourteenth amendment. I would ask those who deny this power to Congress to inform us what is meant by the words, "*Congress* shall have power to enforce," &c. What power of Congress is meant? It is the power of *legislation*. Surely some action is contemplated besides a "judicial veto." What is it?

Now, Congress is certainly entrusted with a duty, and with power to perform it. It is for Congress to say what means for the performance of this duty are necessary and proper. It is to judge of the necessity for the action they take.

McCulloch *vs.* Maryland, 4 Wheaton.

Knox *vs.* Lee, 12 Wall., 457.

In the exercise of this judgment it has deemed it necessary and proper, in order to secure in part, at least, to persons the equal protection of the laws, to provide, where such equal protection is denied by a State court, for a removal of the cause to the United States court.

I believe that it is not seriously questioned but that this is a proper mode in civil cases, but the objection is strongly urged that it is an exceedingly improper mode in criminal causes. Let us consider the objections which are made to the law on this account.

The judicial *power* of the United States is, by the constitution, extended to *all cases at law* or in equity, arising under the Constitution or the laws passed in pursuance thereof.

It is not simply to cases, but to *all* cases which in the case of Martin *vs.* Hunter, is referred to as showing a design "*ex industria*" that in this class of cases enumerated by the Constitution *all cases whatsoever* should be included.

This, of course, includes criminal cases, which are cases at law, where a Federal question arises. In the case of Cohens *vs.* Virginia, 6th Wh., this Court expressly decided that the judicial power of the United States extended to a criminal cause when a State was a party, and took jurisdiction of it under its appellate powers, and asserted its power to reverse the action of the State court.

The judicial *power*, therefore, of the United States, even in a criminal cause in certain cases does therefore so far trench upon the sovereignty of a State, that it may seize hold of the controversy even after the State has fully considered the matter, and rendered its final judgment and may reverse and annul the deliberate and perfected action of the State court. This cannot be denied or controverted.

The question can arise then only as to the mode of exercising that power, and the right of Congress in the distribution of this judicial power to lodge it in an inferior court, to wit: The Circuit Court of the United States.

The objection to it cannot be that a State is a party. As we have before seen, and is fully stated in Cohens *vs.* Virginia, original jurisdiction is not given to this court because a State is a party in a case arising under the Constitution or a law, but because it is such a *case* and in these cases as we have seen, inferior courts may have concurrent jurisdiction with the Supreme court, though a State may be a party and so it was provided by the Judiciary act as it is now found in section 687, of the Revised Statutes. In some way or other then, all cases involving a Federal question may be brought under the supervision of the Federal judicial power even though a State may be a party, and even though a suit may not be, and cannot be originally commenced in the Federal court. See U. S. *vs.* Rivara, 2 Dallas, 297.

Two modes of doing this have been exercised from the earliest period, one by *writ of error or appeal after* judgement, and one by *removal before judgment.* In Martin *vs.* Hunter, it was argued by Virginia that it was much more offensive to the sovereignty of the State to do this *after* the State had passed its judgment upon the matter, and that it could not be done after judgment *because* "Congress must have an unquestionable right to *remove* all cases within the scope of the judicial power from the State courts to the courts of the United States, at

any time before final judgment, though not after final judgment." (p. 346.) The answer to this was (p. 350.) "Precisely the same objections exist as to the right of removal before judgment, as after, and both must stand or fall together."

"The existence of this power of removal is familiar in courts acting according to the course of the common law in *criminal* as well as in civil cases, and it is exercised before as well as after judgment." (p. 349.)

"This remedy of removal of suits would be entirely inadequate to the purposes of the Constitution if it could act only on the parties, and not upon the State courts. In respect to *criminal prosecutions*, the difficulty seems admitted to be insurmountable; and in respect to civil suits there would in many cases be rights without corresponding remedies. If State courts should deny the constitutionality of the authority to remove suits from their cognizance, in what manner could they be compelled to relinquish the jurisdiction? In respect to *criminal cases* there would at once be an end of all control, and the State decisions would be paramount to the Constitution, and though in civil suit the courts of the United States might act upon the parties, yet the State courts might act in the same way; and this conflict of jurisdictions would not only jeopardize private rights, but bring into imminent peril the public interests." (p. 350.)

It may not be quite so consonant with the dignity of the State sovereignty to appear before an inferior Federal court as to appear before the Supreme Court, but there is no constitutional objection to its appearance before such inferior court, and surely it is a less interference to take jurisdiction of a cause before the State court has acted upon it than to assume that superiority over it which is the attribute of an appellate tribunal.

See Cohens *vs.* Virginia, 6 Wh., p. —.

At about the time of the decision of Martin *vs.* Hunter, was passed the act of 1815, in relation to revenue cases, which provided for the removal of *criminal cases* from State to Federal Circuit Courts.

This act, which grew out of the opposition of the New England States to the war with Great Britain, provided:—

"If any suit or *prosecution* be commenced in any State court against any collector, &c., under color of this act, * * * for anything done by virtue of this act, and the defendant shall, at the time of entering his appearance, file his petition, &c., [as in this case,] it shall then be the duty of the State court to proceed no further in the cause," &c. It then provides that the suit shall proceed in the United States court, as if brought there by original process.

This was approved by President Madison, the author of the Virginia Resolutions of 1798 declaratory of State rights, and supported by the Democratic party, including John C. Calhoun.

Annals of Cong., 13th Cong., vol. 3, p. 1899.

The act of 1833 provided for the removal of any suit or *prosecution*. The chairman of the Judiciary Committee, which introduced this bill of 1833, said:

"It gives the right to remove at any time before trial, but not after judgment has been given, and thus affects in no way the dignity of the State tribunals. *Whether in criminal or civil cases it gives this right of removal.* Has Congress power in criminal cases? He would answer the question in the affirmative. Congress had the power to give the right in criminal as well as in civil cases, because the second section of the third article of the Constitution speaks of all cases in law and equity, and these comprehensive terms cover all. * * * It was more necessary that this jurisdiction should be extended over criminal than over civil cases. If it were not admitted that the Federal judiciary had jurisdiction of criminal cases, then was nullification ratified and sealed forever, for a State would have nothing more to do than to declare an act a felony or misdemeanor to nullify all the laws of the Union."

Thus has stood the law with this interpretation put upon it by the great men of those times, including, upon that committee, Webster, Frelinghuysen, Grundy, and Mangum—sustained by all except Mangum—by Benton, Clay, Forsythe, by the Senate almost unanimously, and by a large majority of the House, and not since questioned by any respectable statesman for nearly half a century. Laws recognizing this power have again and again been enacted by different Congresses, and have had the sanction of the most profound jurists from time to time, until they now exist in the form prescribed by the different sections of the Revised Statutes upon this subject.

In Mayor *vs.* Cooper, 6 Wall., this Court say: "Jurisdiction, original or appellate, alike comprehensive in either case, may be given. The constitutional boundary line of both is the same. Every variety and form of appellate jurisdiction within the sphere of the power extending as well to the courts of the States as to those of the nation is permitted. *There is no distinction between civil and criminal cases.* Both are within its scope."

In Insurance Co. *vs.* Dunn, (19 Wall., 226,) the Court, after affirming in the strongest manner the validity of the acts of removal of causes from State to Federal courts, "*where the least Federal ingredient is involved,*" without any restriction say: "The twelfth section of the act of 1789 and *the third section of the act of 3d March, 1833,*

relating to revenue officers, present the same question. We are not aware that a doubt of the validity of *either* has ever been expressed by any Federal court. The acquiescence is now universal."

The act of 1833 provides for the removal of criminal causes.

See also Vannevar *vs.* Bryant, 21 Wall., 41; Hodgson *vs.* Millard, 3 Grant, Pa., 416—Strong, J.; Com. *vs.* Artman, 3 Grant, Pa., 436—Grier, J.; Case of Madison J. Wells, Alb. Law Journal Feby. 9, 1878—Bradley, J.; Story's Com. on the Constitution, sec. 1701; Federalist No. 82—approved by Story in above section; State *vs.* Hoskins, 77 North Carolina, 530.

In the case of Blyew *vs.* The United States, 13 Wall., 581, the United States Circuit Court took jurisdiction of a case of murder in Kentucky, of a colored person by a white person, on the ground that by the law of Kentucky, colored persons could not be witnesses against white persons, under the act of Congress of April 9, 1866, which gave to the Circuit Courts of the United States, jurisdiction of all cases, civil and criminal, *affecting* persons who are denied or cannot enforce in the State courts any of the rights secured to them by the first section of the act.

The court decided that a mere *witness* in a cause, was not a *party* "affected" by the denial of his right to give testimony. As to jurisdiction, the court, Strong, J., say: "Was then the prosecution or indictment against these defendants a cause affecting any such persons? If it was, then by the provisions of the act, it was within the jurisdiction of the court, and if it was not, that court had no jurisdiction."

This, it will be observed, was a case in which the United States court took *original* jurisdiction, an exercise of power far beyond that of removal from the state court.

Is it not manifest that Congress in the exercise of its power to enforce the equal protection of the laws by appropriate legislation, has in adopting a remedy which has had the sanction of the government from the beginning of its judicial history, used those means which, consistent with any efficiency, are the least offensive possible to the dignity and sovereignty of the States? Could it have done less? To have held out to the class the amendments were designed to protect the remedy only of appeal to the Supreme court of the United States, from the final judgment of the State, would have been simple mockery, an evasion of the obligations of the amendments, and a practical abandonment of the colored race to the tender mercies of their former owners, under just such laws as this court has said led to the adoption of the last three amendments, for if the remedy of removal is denied in this instance upon the ground that it is unconstitutional to remove a criminal cause, the remedy must be denied to all criminal causes

which can arise under the amendments, or any laws passed in pursuance thereof.

It is all along to be borne in mind, that we claim no right of general supervision over the criminal law of the State. It is only when a Federal ingredient is involved, and for the purposes of this case only when the equal protection of the laws is denied by the State.

This Court has laid down a much broader field of Federal jurisdiction than it is necessary for us to invoke. It has held that Congress may confer jurisdiction upon the United States courts, where the least Federal ingredient is involved. Mayor *vs.* Cooper, 6 Wall., 252.

One important thing is apparently overlooked in the resolutions of the Assembly, the discussions thereon, and in the position of counsel, and that is that the Government of the United States is also the government belonging to the people of Virgiuia. The people of Virginia had their full share in creating the Government of the United States. In the highest sense it is not strictly correct to speak of the sovereignty of the State or of the United States. The people are sovereign, and they have established both governments. The United States is not a foreigner in Virginia. It is *our* Government as Virginians. The United States does not as a foreign sovereign propose to "invade" the sovereignty of Virginia, and take the trial of criminals out of its hands and administer the law according to its own ideas, or its own laws. The Federal judges are citizens of Virginia. The jurors in a Federal court would be citizens of Virginia. The law of Virginia is to be observed and carried out to its fullest extent according to the practice of her courts. The only practical difference between the State and Federal court is, that in one case Judge Tredway would preside, and in the other Judge Rives. Both are citizens of Virginia, both citizens of the United States, both bound by the law of Virginia, both equally interested in preserving the honor and dignity of the State of Virginia, as well as of the United States.

The interference proposed, however, limited as it is, can be entirely avoided by the State by a faithful and scrupulous observance on her part of the obligations of the Constitution in all its parts, which she, with the other States, has assumed, and by which she has covenanted to abide, and thus will her honor and dignity be best preserved.

W. WILLOUGHBY,
Of Counsel.

1879
Ex parte 10-339

Sub Oct 17/79

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 4.—ORIGINAL.

EX-PARTE: IN THE MATTER OF THE COMMONWEALTH OF VIRGINIA AND J. D. COLES, PETITIONERS.

PETITIONS FOR HABEAS CORPUS. 7 Wall 524

FILED APRIL 7, 1879.

Denied

SUPREME COURT OF THE UNITED STATES.

No. 4.—ORIGINAL.

EX PARTE: IN THE MATTER OF THE COMMONWEALTH OF VIRGINIA AND J. D. COLES, PETITIONERS.

PETITIONS FOR HABEAS CORPUS.

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1 To the honorable the Supreme Court of the United States:

Your petitioner, the Commonwealth of Virginia, respectfully represents that J. D. Coles has been for the last five years and still is the county court judge of the county of Pittsylvania, in said commonwealth, duly elected, qualified, and acting as such under and according to the constitution and laws of the said commonwealth.

That at a stated term of the district court of the United States for the western district of Virginia, in the fourth circuit, begun and held at Danville, within and for said district and circuit, on the 25th day of February, A. D. 1879, and continued by adjournment to and including the 27th day of February, 1879, an indictment was found in said United States district court, by the grand jury then and there attending said court, against the said J. D. Coles, alleging and charging that he,

2 the said Coles, on the day of , in the year of our Lord, 1878, at the said western district of Virginia, and within the jurisdiction of said district court, being then and there the judge of the county court of Pittsylvania County aforesaid, and an officer charged by law with the selection of jurors to serve in the circuit and county courts of said county, did then and there exclude and fail to select as grand and petit jurors certain citizens of said county of Pittsylvania, of African race and black color, said citizens possessing all other qualifications prescribed by law, and being by him the said J. D. Coles, judge as aforesaid, excluded from the jury lists made out by him, as such judge, on account of their race, color, and previous condition of servitude, and for no other reason, against the peace of the United States and their dignity, and against the form of the statute of the United States in such case made and provided, as will more fully appear from a copy of said indictment herewith filed.

Your petitioner shows that since the finding of said indictment, to

3 wit, on the 8th day of March, A. D. 1879, process was issued thereon, from the clerk's office of said district court, which in the endorsement of the United States district attorney upon said process and in the return endorsed thereon by the deputy marshal is styled a "bench warrant," directed to the marshal of the United States for the western district of Virginia, and to his deputies, or any or either of them, commanding them, in the name of the President of the United States of America, to apprehend the said J. D. Coles and bring him before the said district court of the United States in Danville to answer the indictment aforesaid on the first day of the next term thereafter.

Your petitioner further shows that said process was delivered to James C. Luck, a deputy of John F. Lewis, the United States marshal for said district, by him to be executed, and that in obedience thereto, and under the authority thereby given, the said James C. Luck, as such deputy marshal, afterwards, to wit, on the 13th day of March, A. D. 1879, arrested the said J. D. Coles and took him into custody and continues

4 still to hold the said J. D. Coles in his custody under and by the authority of the said process, a copy of which process and of the return thereon, endorsed by said deputy marshal, is herewith filed.

Your petitioner is advised that the said district court of the United States had and has no jurisdiction of the matters charged against the said J. D. Coles in the said indictment; that they constitute no offence punishable in said district court, and that the finding of the said indictment, and the consequent arrest and imprisonment of the said J. D.

Coles, under the process issued thereon, are unwarranted by the Constitution of the United States, or any law made in pursuance thereof; and are not only in violation of the rights of the said J. D. Coles, but are in violation also of the sovereign rights of your petitioner, whose judicial officer he is, and to whom alone he can be held accountable for his acts or omissions as such officer.

The term of office for which the said Coles was elected as county court judge as aforesaid will not expire for a considerable time yet to come, to wit, on the 1st day of January, 1880, nor thereafter until his successor shall have qualified.

To the end, therefore, that the laws of your petitioner may be duly administered by the said J. D. Coles, as county court judge of the county of Pittsylvania, without let or hindrance, and with his functions unimpaired, it is proper and necessary that he shall be discharged from the illegal custody in which he is now held for trial under said indictment by color of the authority of the United States and left free to perform his official duties as such judge without interference on the part of the district court of the United States for the western district of Virginia, or of any one acting under its authority.

Your petitioner therefore prays that the record of the said proceedings of said district court for the western district of Virginia be brought by certiorari into this court, and that a writ of habeas corpus be awarded by this court, directed to the said James C. Luck, deputy marshal for the said John F. Lewis, marshal for the western district of Virginia, commanding him to have before your honors, on a day to be named therein, the body of the said J. D. Coles, together with the cause of his capture and detention, that he may undergo and receive whatsoever this court shall then consider of him in that behalf.

And your petitioner will ever pray, &c.

FRED. W. M. HOLLIDAY,
Governor of Virginia.

JAS. G. FIELD,
Att'y Gen'l of Va.

I, Jas. G. Field, attorney-general of Virginia, do certify that the statements contained in the foregoing petition are true so far as they are within my personal knowledge, and so far as they are derived from *the from* information, I believe they are true.

I further certify that said petition is filed in pursuance of preamble and resolutions of the general assembly of Virginia, approved March 3d, 1879, a duly authenticated copy whereof is herewith filed.

Given under my hand this 7th day of April, 1879.

JAS. G. FIELD,
Att'y Gen'l of Va.

Subscribed & sworn to before me this 7th day of April, A. D. 1879.

D. W. MIDDLETON,
Clerk Supr. Court U. S.

(Indorsed:) Supreme Court U. S., 1878, Octo. term. Original. No. 5. Ex parte. The Commonwealth of Virginia, petitioner. Petition for habeas corpus & certiorari. Filed 7th April, 1879.

(Indorsed:) In Supreme Court U. S. Ex parte. Commonwealth of Va. Petition for habeas corpus.

To the honorable the Supreme Court of the United States:

Your petitioner, J. D. Coles, respectfully represents that he is a citi-

zen of the United States and of the State of Virginia, residing in the county of Pittsylvania, in said State, and that he is the county court judge of said county of Pittsylvania, duly qualified and acting as such.

Your petitioner further shows that he has been indicted in the district court of the United States for the western district of Virginia, in the fourth circuit, held at Danville, for an alleged offence against the laws of the United States, said indictment alleging that your petitioner being, as such judge and officer, charged by law with the selection of jurors to serve in the circuit and county courts of said county of Pittsylvania, did exclude and fail to select as grand and petit jurors certain citizens of said county, of African race and black color; and alleging further that said citizens possessing all other qualifications prescribed by law were excluded from the said jury lists by your petitioner, as judge as aforesaid, on account of their race, color, and previous condition of servitude, as will more fully appear by a copy of said indictment herewith filed.

9 Your petitioner further shows that since the finding of said indictment, to wit, on the 8th day of March, A. D. 1879, process was issued thereon from the clerk's office of said district court, which, in the endorsement of the United State district attorney upon said process and the return endorsed thereon by the deputy marshal, is styled a "bench warrant," directed to the marshal of the United States for the western district of Virginia, and to his deputies, or any or either of them, commanding them, in the name of the President of the United States of America, to apprehend your petitioner and him bring before the said district court of the United States in Danville to answer the indictment aforesaid on the first day of the next term.

Your petitioner further shows that said process was delivered to James C. Luck, a deputy of John F. Lewis, the United States marshal for said district, by him to be executed, and that, in obedience thereto, and under the authority thereby given, the said James C. Luck, as such deputy marshall, afterwards, to wit, on the 13th day of March, A. D. 1879, arrested your petitioner and took him into custody, and continues still to hold your petitioner in his custody, under and by the au-

10 thority of said process, a copy of which, and of the return endorsed thereon by said deputy marshal, is herewith filed.

Your petitioner further shows that, as he is advised, the said district court had and has no jurisdiction of the matters charged against him in said indictment; that they constitute no offence punishable in said district court; and that the finding of the said indictment and the consequent arrest and imprisonment of your petitioner are unwarranted by the Constitution of the United States, or by any law made in pursuance thereof; and are in violation of the rights of your petitioner and of the State of Virginia, whose judicial officer he is.

In order that he may be relieved from the illegal custody in which he is thus held for trial under said indictment and under and by color of the authority of the United States, your petitioner prays that the record of said proceedings of said district court be brought by certiorari into this court; and that a writ of habeas corpus be awarded by this court directed to the said James C. Luck, deputy marshal for the said John F. Lewis, marshal of the western district of Virginia, com-

11 manding him to have before your honors, on a day to be named therein, the body of your petitioner, together with the cause of his caption and detention, that he may undergo and receive whatsoever this court shall then consider of him in that behalf.

And as in duty bound your petitioner will ever pray, &c.

J. D. COLES.

STATE OF VIRGINIA,
County of Pittsylvania, sct:

In the western district of Virginia.

On this the 22nd day of March, 1879, before me, a notary public in and for the county and State aforesaid, duly commissioned and qualified, personally appeared in said county J. D. Coles, the petitioner named in the above petition, and made oath that he had duly signed the same, and acknowledged it in my presence, and said affiant further made oath, in due form of law, that the facts set forth in the above petition are true.

Given under my hand and official seal this the 22nd of March, 1879.

[SEAL.] B. B. MUNFORD, *N. P.*

(Indorsed:) In Supreme Court. Ex parte. J. D. Coles. Petition for writ habeas corpus.

The exhibits referred to in this petition will be found with petition of the State of Virginia.

(Indorsed:) J. D. Coles. Petition for habeas corpus.

12 (Indorsed:) Supreme Court U. S., 1878, October term. Original. No. 5. Ex parte. In the matter of the Commonwealth of Virginia, petitioner. Petition of J. D. Coles. Petition for writ of habeas corpus and certiorari. Filed 7th April, 1879.

13 District court of the United States of America for the western district of Virginia in the fourth circuit.

At a stated term of the district court of the United States of America for the western district of Virginia in the fourth circuit, begun and held at Danville, within and for the district and circuit aforesaid, on the 25 of February, in the year of our Lord one thousand eight hundred and seventy-nine, and continued by adjournment to and including the 27 day of February, in the year of our Lord one thousand eight hundred and seventy-nine.

WESTERN DISTRICT OF VIRGINIA, *ss:*

The jurors of the United States of America within and for the district and circuit aforesaid. on their oath, present that J. D. Coles, late of Pittsylvania County, in the district and circuit aforesaid, heretofore, to wit, on the day of , in the year of our Lord one thousand eight hundred and seventy-eight, at the said western district of Virginia, and within the jurisdiction of this court, being then and there the judge of the county court of Pittsylvania County, and an officer charged by law with the selection of jurors to serve in circuit & county courts of the said county of Pittsylvania, did then & there exclude & fail to select as jurors, on account of race, color, and previous condition of servitude, certain citizens of the county aforesaid, possessing all other qualifications prescribed by law, against the peace of the said United States and their dignity, and against the form of the statute of the said United States in such case made and provided.

SECOND COUNT.—And the jurors aforesaid, on their oath aforesaid, do further present that J. D. Coles, late of Pittsylvania County, in the

district and circuit aforesaid, heretofore, to wit, on the day of , in the year of our Lord one thousand eight hundred and seventy-eight, at the said western district of Virginia, and within the jurisdiction of this court, being then and there the judge of the county court of Pittsylvania County, and an officer charged by law with the selection of jurors to serve in the circuit and county courts of said county, did then and there exclude and fail to select as grand and petit jurors certain citizens of the county aforesaid of African race and black color; said citizens possessing all other qualifications prescribed by law were excluded from the jury lists aforesaid by him, the said J. D. Coles, judge of the county aforesaid, on account of their race, color, and previous condition of servitude, against the peace of the said United States and their dignity, and against the form of the statute of the said United States in such case made and provided.

14 THIRD COUNT. And the jurors aforesaid, on their oath aforesaid, do further present that J. D. Coles, late of Pittsylvania County, in the district and circuit aforesaid, heretofore, to wit, on the day of , in the year of our Lord one thousand eight hundred and seventy eight, at the said western district of Virginia, and within the jurisdiction of this court, being then and there the judge of the county court of Pittsylvania County, and an officer charge' by law with the selection of jurors to serve in the circuit and county courts of said county, did then and there exclude and fail to select as grand & petit jurors certain citizens of the county aforesaid of African race and black color; said citizens possessing all other qualifications prescribed by law were excluded from the jury lists aforesaid by him, the said J. D. Coles, judge of the county court aforesaid, on account of their race, color, and previous condition of servitude, and for no other reason, against the peace of the said United States and their dignity, and against the form of the statute of the said United States in such case made and provided.

W. S. LURTY,
U. S. District Attorney.

On the testimony of Robert Treadway, Hughes Dillard, Charles Dabney.

A copy.
Teste:

CH. P. LATHAM, *Clk.*
B.

(Indorsed:) Ex. No. 1, with Coles' petition. No. 272. United States vs. J. D. Coles, for the violation of civil & legal rights of citizens. Indictment. U. S. dist. att'y. Copy. A true bill. D. H. Spencer, foreman. Filed 27 Feb'y, '79. Ch. P. Latham, cl'k. B.

15 To the marshal of the United States for the western district of Virginia, and to his deputies, or any or either of them:

Whereas at a district court of the United States of America for the western district of Virginia, began and held at Danville, within and for the western district of Virginia aforesaid, on the 26 day of Feb'y, in the year of our Lord one thousand eight hundred and seventy-nine, the grand jurors in and for the said western district of Virginia brought into the said court a true bill of indictment against J. D. Coles for having violated civil rights, as by the said indictment now remaining on file and of record in the said court may more fully appear, to which indictment the said J. D. Coles has not yet appeared or pleaded:

Now, therefore, you are hereby commanded in the name of the President of the United States of America to apprehend the said J. D. Coles, and him bring before the said court in Danville to answer the indictment aforesaid on the first day of next term.

Witness the honorable Alexander Rives, judge of the said court, and the seal thereof, at Danville, in said district, the 8 day of M'ch, in the year of our Lord one thousand eight hundred and seventy-9.

W. S. LURTY,
U. S. District Attorney.
CH. P. LATHAM, *Clerk.*
B.

16 PITTSYLVANIA CO. HO., VA., *March 13th*, 1879.

The within is a true copy of a bench warrant issued from the clerk's office of the district court of the United States for the western district of Virginia, at Danville, Va., dated on the 8th day of March, 1879, and delivered to me to be executed, and by authority of which I have this day arrested the within-named J. D. Coles, and now hold said Coles in my custody.

J. C. LUCK,
Deputy U. S. Marshal,
For JNO F. LEWIS,
Marshal.

(Indorsed:) No. 272. United States dist. court, western district of Virginia. The United States of America vs. J. D. Coles. No. 2. Bench warrant. W. S. Lurty, U. S. attorney. Marshall return. Executed this day of , 1879. Filed , 1879. , U. S. dist. clerk.

17 Preamble and joint resolution instructing attorney-general to defend citizens of Virginia unlawfully molested by Federal courts, and requesting our Representatives in Congress to ask for a committee of investigation on the same subject. Approved March 3d, 1879.

Whereas five judges of this Commonwealth, to wit, J. B. Coles, of Pittsylvania, S. I. Mullens, of Henry, G. H. Bernard, of Franklin, Sem G. Staples, of Patrick, and T. T. Bouldin, of Charlotte, have been indicted in the circuit court of the United States for the western district of Virginia for the alleged offence of failing to execute the laws of Virginia, which action of said court is, in the opinion of this general assembly, usurpation and an exercise of unwarranted power: Therefore,

1. Resolved by the general assembly of Virginia, That the attorney-general is hereby directed to take proper steps to bring the aforesaid proceedings to the adjudication of the supreme court of Virginia, or the Supreme Court of the United States, in order that such lawless measures may be checked by competent authority; and he is likewise
18 directed to appear at once in behalf of these and all other citizens of this Commonwealth who may hereafter be seized and held contrary to law by any Federal judge or court in Virginia.

2. The governor is hereby authorized to employ necessary counsel to assist the attorney-general in proceedings undertaken under the direction of this resolution.

3. That the Representatives in Congress from this Commonwealth are hereby requested to move in the House of Representatives of the United States for a committee to enquire whether the Hon. Alexander Rives, judge of the district court of the United States for the western district

of Virginia, holding the circuit court of the United States for said district, has not been, and is not now, usurping judicial power for the purpose of bringing about an unnecessary conflict between the authorities of the State of Virginia and of the United States in the enforcement of the criminal laws of this Commonwealth within said district, thereby endangering the harmony, peace, and good order of this Commonwealth.

A copy.

J. BELL BIGGER,
Clerk of House of Delegates and
Keeper of the Rolls of Virginia.

MARCH 22D, 1879.

(Indorsed:) Copy of resolution of general assembly of Virginia filed with petition for habeas corpus.

18½ (Indorsed:) Supreme Court U. S. 1878, Octo. term. Original. No. 4. Ex parte. In the matter of the Commonwealth of Virginia, petitioner, and ex parte J. D. Coles, petitioner. Petitions for habeas corpus & certiorari. Filed 7 April, 1879.

(Indorsement on cover:) Supreme Court U. S. 1878, October term. Original. No. 4. Ex parte. In the matter of the Commonwealth of Virginia, petitioner. Copy of indictment, bench warrant, & resolutions of general assembly of Virginia. Filed 7th April, 1879.

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In the Supreme Court of the United States.

Ex Parte, J. D. COLES,
On Petition for a Writ of Habeas Corpus,

AND

Ex Parte, The Commonwealth of Virginia,
On Petition for a Writ of Habeas Corpus.

BRIEF FOR PETITIONERS.

STANLEY SNODGRASS, PRINTER, 637 F STREET.

In the Supreme Court of the United States.

Ex Parte, J. D. COLES, on petition for a writ of Habeas Corpus,

and

Ex Parte, THE COMMONWEALTH OF VIRGINIA, on petition for a writ of Habeas Corpus.

BRIEF FOR PETITIONERS.

The authority of the Supreme Court of the United States to issue the writ of Habeas Corpus "and to examine the proceedings in the inferior Court, so far as may be necessary to ascertain whether that Court has exceeded its authority is no longer open to question"—*Ex Parte Lange*, 18 *Wallace*, 166.

The only doubt as to its authority to issue the writ upon the application of the petitioner, Coles, arises from the fact that no previous application has been made by him to a Circuit Court, or Judge.

We respectfully submit that no such application was necessary.

Since the Act of 27th March, 1868, no appeal can be taken to the Supreme Court from the decision of a Circuit Court in a Habeas Corpus case. But, as was held in *Ex Parte Yerger*, 8 *Wallace*, 85, this act did not deprive the Supreme Court of its jurisdiction by virtue of its general appellate, or supervisory power over all courts inferior to it, to issue the writ of Habeas Corpus, aided by the writ of certiorari, for the relief of parties unlawfully imprisoned under the order of any such court; although such imprisonment might be on a criminal charge of which the Supreme Court could take no jurisdiction on writ of error.

There can be no reason why the writ should not be issued to relieve from imprisonment, in this case, because the order complained of is not that of a *Circuit*, but of a *District* Court.

Metzger's Case, 5 Howard, 176, (which, as this Court has said, "stands alone") is no authority to the contrary.

That case can only be reconciled with the well established doctrines of this Court, by supposing that the District Judge was not considered to be acting as a Court; or even by virtue of his general power as a Judge; but under a special authority, conferred on him by statute, over which no Court whatever had any appellate or supervisory power.

The opinion in Yerger's case indicates plainly that the Court did not consider that it made any difference whether the imprisonment was under the order of *District*, or of a *Circuit* Court.

The orders referred to as subject to revision are spoken of, not as orders *of the Circuit Courts*, but as orders of the "*inferior Courts of the United States;*" and it is declared to be "established, upon principle and authority, that the appellate jurisdiction, by Habeas Corpus, extends to all cases of commitment by *the judicial authority* of the United States, not within any exception made by Congress."

The Circuit and the District Courts stand upon precisely the same footing, as to this matter, so far as the appellate power of the Supreme Court is concerned. No writ of error can be sued out, or appeal taken from the judgment of either, and the general supervisory jurisdiction of the Supreme Court exists alike as to both.

Nor is there any reason to question the jurisdiction of the Supreme Court to issue the writ of Habeas Coopus, in this case, because no application has been previously made to an inferior court, or Judge.

It is immaterial whether the unlawful imprisonment is under an order made on a petition for the writ of Habeas Corpus, or in the exercise of power wrongfully claimed by an inferior

court. Here too the supervisory jurisdiction of the Supreme Court is the same in the one case as in the other.

Accordingly we find that in *Ex Parte Jackson*, 96 *U. S. Rep.*, 727, a rule to show cause why a writ of Habeas Corpus should not be issued was awarded on the petition of a party seeking to be relieved from imprisonment under a judgment of a Circuit Court of the United States, alleged to be unlawful because of the want of jurisdiction in that court to render it, and the application was heard and decided upon its merits, although no application for the writ had been previously made to the Circuit, or District Court, or Judge.

In *Ex Parte Madison Doom*, a petition was filed at the October term, 1876, of this court, for a writ of Habeas Corpus to be relieved from imprisonment under a judgment of the District Court of the United States for the Western district of Virginia upon an indictment under the same act of Congress under which the indictment in this case was found. No application had been made to the Circuit, or District Court, or Judge, for a writ of Habeas Corpus. On the day before the application was to be heard upon its merits, the petitioner was pardoned by the President, and of course no further proceedings were had in the case. The brief of Solicitor General Phillips had, however, been filed, and in it no objection was made to the jurisdiction of this Court on the ground that the application was made to be relieved from the judgment of the District, rather than of the Circuit Court, nor upon the ground that no application for a writ of Habeas Corpus had been previously made to the Circuit or District Court, or Judge. The application was about to be heard upon its merits, that is to say, upon the question of the constitutionality of the law under which the petitioner was sentenced, when the further action of the Court was rendered unnecessary by the pardon granted by the President.

So that if the application in this case were made only in the name of the petitioner Coles, we think it clear that the Court would have jurisdiction to grant the writ, if the position can

be maintained that the section of the act of Congress under which he has been indicted is unconstitutional and void.

But the State of Virginia has, in her own name, applied for the writ in his behalf, and this, as we conceive, calls for the exercise of *original* jurisdiction by this Court, and removes all possible doubt as to its power and duty to grant the writ, if the law under which he has been taken in custody is unconstitutional and void.

Supposing it so to be, the right of the State to apply for his discharge can hardly be questioned. He is one of her judicial officers whose services are necessary to the administration of her laws, and she has a direct interest in having him set at liberty that he may be placed in a position to render those services in a proper manner, as well as in seeing to it that he shall not be controlled in the discharge of his official duties by any power other than herself.

If a father can sue out a Habeas Corpus on behalf of his child (the King *vs.* Ward, 1 W. Black's Rep., 386,) a wife in behalf of her husband (per Lord Campbell, C. J., in Cobbett *vs.* Hudson, 10 Eng. Law and Eng. Rep., 318,) an agent or friend in behalf of a prisoner (14 Howell's State Trials, 4 resolution, p. 814,) it will hardly be denied that it ought to be granted on the application of a State seeking to have one of her Judges discharged from imprisonment under an arrest made by a marshal of the United States, upon process issued from a Court of the United States, under an indictment found against him for an act done in the regular discharge of his duties as such Judge, which indictment and arrest she deems to be unwarranted by the Constitution of the United States, and in violation of her rights as a sovereign State.

It may, however, be suggested that the State asks for the writ to be issued to one of her own citizens, commanding him to produce the body of the party held in his custody; and that the judicial power of the United States, so far as the States are concerned, extends only to controversies "between two or more States;" "between a State and citizens

of another State;" and "between a State and citizens thereof, and foreign States, citizens or subjects," and not to controversies between a State and her own citizens. To this it may be answered, that the party against whom the State of Virginia asks that the writ shall be issued is an officer of the United States, acting under process issued from a Court of the United States, and under color of the authority of the United States, that, while he is thus acting, the State of Virginia has no control over him and he is not subject to her jurisdiction. If a writ of Habeas Corpus issued by one of her courts were served upon him, it would be his right and duty to decline to obey such writ, further than to state the character in which, and authority under which he was acting, and upon such return the jurisdiction of the State court to proceed further would be ousted. So that if the jurisdiction of this court to issue the writ should be held to depend on the citizenship of the marshal, it might well be insisted that, for the purpose of giving jurisdiction, he should be treated as a citizen of a Foreign State, within the meaning of the constitutional provision, being unquestionably a citizen and officer of a government distinct from and independent of the State Government.

But the jurisdiction in this case does not depend upon citizenship. It is a case "arising under the constitution and laws of the United States," and if the Supreme Court can, as it rightfully and uniformly does, take jurisdiction, under its appellate power, on behalf of a citizen against his State, of cases thus arising, it would seem to follow *a fortiori* that it may and should take original jurisdiction in favor of the State, of a case arising in like manner, against one of her own citizens, jurisdiction over whom has been taken away from her by the Government of the United States, when she seeks relief against acts done by him under color of the authority of the United States.

If it be admitted that the State of Virginia has a right to make the application, there can be no doubt of the power of

this court, in the exercise of the original jurisdiction conferred on it by the constitution, to issue the writ prayed for.

The decision in Ex Parte Barry, 2 Howard, 65, to the effect that the *original* jurisdiction of this court does not extend to Habeas Corpus cases, is expressly confined to cases of petitions filed by "*private individuals.*" The Constitution giving original jurisdiction to this court in *all cases* "in which a State shall be a party."

The question for consideration therefore is whether or not the 4th section of the Act of 1st March, 1875, under which this prosecution is had, is constitutional. If it is not a constitutional and valid law, then, upon the principle of the Yerger and Lange cases, this court should order the discharge of Coles. The decision in Ex Parte Parks, 93 U. S. Rep., 18, has no application to this case.

In Ex Parte Parks there was no doubt of the power of Congress to make the act of which the petitioner had been convicted an offence under the law; and the only question was whether or not it was so made by the statute under which the prosecution was had. It was simply a question of construction of a valid statute, and was clearly within the jurisdiction of the court before which he was tried. All therefore that was decided, was, that this court would not, upon Habeas Corpus, review the action of the court below, upon a question which it had jurisdiction to pass upon.

In the case now under consideration we insist that Congress had no power under the Constitution to make the act with which the petitioner is charged an offence against the United States. That the law declaring it to be such an offence is null and void, so that no court of the United States can exercise any jurisdiction under it.

The constitution and laws of Virginia confer upon all of her citizens, of every race and color, "equal civil and political rights and public privileges."

No discimination is made by them between the races in the selection of jurors. They are to be selected by the Judge of

each county or corporation court within the State, who is required, annually, at the May or June term of his court, to "prepare a list of such inhabitants of the county or corporation not exempt" (from service on juries) "as he shall think well qualified to serve as jurors, being persons of sound judgment and free from legal exception."

For the proper exercise of the discretion thus conferred on them, the Judges are responsible to the State of Virginia, and held accountable to her, and they can properly be held accountable to her only. For her to permit them to be made so to any other government or power on earth, would be an abdication of her sovereign right to administer her own laws.

The State alone has a right to determine who shall serve as jurors in her own courts.

Jury service is not a "right or privilege" of the citizen, but a *duty* imposed upon him. Even if it could be regarded as a "privilege or right," it would belong to him as a citizen of the State, and not as a citizen of the United States, and Congress would have no power to pass a law securing it to him.

"The Government of the United States is one of delegated powers alone. Its authority is defined and limited by the constitution. All powers not granted to it by that instrument are reserved to the States or the people. No rights can be acquired under the constitution or laws of the United States, except such as the Government of the United States has the authority to grant or secure. All that cannot be so granted or secured, are left under the protection of the States." (From the opinion of the court in United States *vs.* Cruikshank, 92 U. S. Rep., 551.)

In the case of the United States *vs.* Railroad Company, 17 Wallace, 322, Mr. Justice Hunt, delivering the opinion of the court, says, on page 327:

"The right of the States to administer their own affairs through their legislative, executive and judicial departments, in their own manner, through their own agencies, is conceded

by the uniform decisions of this Court, and by the practice of the Federal Government from its organization."

There is nothing in the Constitution of the United States, or in any of the amendments, conferring on any person, or on any class of persons, the right to serve upon juries in State courts.

There was much more ground for the claim that the right to practice law in State courts, and the right of suffrage, were conferred by the constitution as amended; yet this Court in Bradwell *vs.* The State, 16 Wallace, 130, and in Minor *vs.* Hoppersett, 21 Wallace, 178, held that neither of them was so conferred.

It seems to be clear, therefore, that the constitution has conferred no power upon Congress to pass any law defining the qualifications of jurors in State courts, or requiring the States to permit any particular class of persons, of any race or color, to serve on juries in their courts, and that the act of 1st March, 1875, so far as it seeks to accomplish this, is null and void.

But if it were conceded that Congress has a general power to provide that colored persons shall be permitted to serve on juries in State courts, it would have no right to make State Judges criminally responsible for failing or refusing to select them.

It is true that Congress is the judge of the appropriateness of its legislation to carry into effect any power conferred on it by the constitution. But this right of determining what legislation is appropriate to carry into effect any particular provision of the constitution must, of necessity, be limited by other constitutional provisions, and by the fundamental principles on which our system of government is based.

No legislation can be "appropriate" which is in conflict with these principles, or which is prohibited, either expressly or by implication, by any provision of the constitution.

The autonomy of the States within the limits of their reserved powers is as essential to the preservation of our system

of government, as is the maintenance of the authority of the Federal Government within its appropriate sphere.

As was said by Chief Justice Chase, in delivering the opinion of the Court in Texas *vs.* White, 7 Wallace, 725:

"The perpetuity and indissolubility of the Union by no means implies the loss of distinct and individual existence, or of the right of self government by the States." * *

"It may not be unreasonably said that the preservation of the States and the maintenance of their governments, are as much within the design and care of the constitution as the preservation of the Union and the maintenance of the National Government. The constitution in all of its provisions, looks to an indestructible Union, composed of indestructible States."

Although the power of Congress "to lay and collect taxes" is apparently unlimited, this Court held in the case of the Collector *vs.* Day, 11 Wallace, 113, that "it is not competent for Congress, under the Constitution of the United States, to impose a tax upon the salary of a judicial officer of a State."

Mr. Justice Nelson, in delivering the opinion of the Court, says, on page 124:

"The general government, and the States, although both exist within the same territorial limits, are separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. The former, in its appropriate sphere, is supreme; but the States within the limits of their powers not granted, or, in the language of the tenth amendment, 'reserved,' are as independent of the general government as that government within its sphere is independent of the States."

Again, on page 125, he says:

"Such being the separate and independent condition of the States in our complex system, as recognized by the constitution, and the existence of which is so indispensable that, without them, the general government itself would disappear from the family of nations, it would seem to follow as a reasonable, if not a necessary, consequence, that the means and instrumentalities employed for carrying on the operations of their

governments, for preserving their existence and fulfilling the high and responsible duties assigned to them in the constitution, should remain unimpaired, should not be liable to be crippled, much less defeated by the taxing power of another government, which power acknowledges no limits but the will of the legislative body imposing the tax. And, more especially, those means and instrumentalities which are the creation of their sovereign and reserved rights, one of which is the establishment of the judicial department, and the appointment of officers to administer their laws."

* * "It is one of the sovereign powers vested in the States by their constitutions, which remained unaltered, and in respect to which the State is as independent of the general government as that general government is independent of the States."

Again, on page 127, he says:

"It is admitted that there is no express provision in the constitution that prohibits the general government from taxing the means and instrumentalities of the States; nor is there any prohibiting the States from taxing the means and instrumentalities of that government. In both cases the exemption rests upon necessary implication, and is upheld by the great laws of self preservation; *as any government whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government.*"

In the case of the Commonwealth of Kentucky *vs.* Dennison, 24 Howard, 66, it was held that no power "is delegated to the general government, either through the Judicial Department or any other department, to use any coercive means to compel the governor of a state to discharge the duty imposed on him by an act of Congress to cause to be delivered up, to the State having jurisdiction of the crime, a fugitive from justice in accordance with the express requirement of Section 2, Article IV, of the Constitution of the United States.

Chief Justice Taney, delivering the opinion of the Court, says, on page 107:

"The words 'it shall be the duty' in ordinary legislation, imply the assertion of the power to command and to coerce

obedience. But looking to the subject matter of this law, and the relations which the United States, and the several States bear to each other, the Court is of opinion, the words 'it shall be the duty,' were not used as mandatory and compulsory, but as declaratory of the moral duty which this compact created, when Congress had provided the mode of carrying it into execution. The act does not provide any means to compel the execution of this duty, *nor inflict any punishment for neglect or refusal on the part of the Executive of the State; nor is there any clause or provision in the constitution which arms the United States with this power. Indeed, such a power would place every State under the control and dominion of the general government, even in the administration of its internal concerns and reserved rights.*"

It is indeed difficult to understand how, in view of the character of our system of government, and especially after these adjudications of the Supreme Court, it can be seriously contended that Congress has power to pass a law making Judges of State Courts criminally responsible in Courts of the United States for their official acts as such Judges.

If the power exists, the administration of Justice by the States, in her own tribunals, is at the mercy of Congress.

If Congress can fine a Judge for his judicial acts, it can imprison him during his whole term of service, or depose him from office. If it has the power claimed for it over the judicial officers of a State, it has like power over members of the legislature who may vote for a law, supposed by Congress to be in violation of any provision of the Constitution of the United States, and over the Executive Officers who may undertake to execute it.

In short, it converts this Government into a consolidated despotism, the despot being the congressional majority of the day.

That this Court will protect the people of the whole Union from the disastrous consequences that must result to all north as well as south, from the recognition that Congress possesses any such power, is confidently hoped for.

JAMES G. FIELD,
Attorney General of Virginia.
WM. J. ROBERTSON, *Counsel.*

FROM THE CONSTITUTION OF VIRGINIA IN RELATION TO COUNTY COURTS.

County Courts.

SEC. 13. In each county of this commonwealth there shall be a court called the county court, which shall be held monthly by a judge learned in the law of the state, and to be known as the county court judge: provided that counties containing less than eight thousand inhabitants shall be attached to adjoining counties for the formation of districts for county judges. County court judges shall be chosen in the same manner as judges of the circuit courts. They shall hold their office for a term of six years, except the first term under this constitution, which shall be three years, and during their continuance in office they shall reside in their respective counties or districts. The jurisdiction of said courts shall be the same as that of the existing county courts, except so far as it is modified by this constitution or may be changed by law.

SEC. 22. All the judges shall be commissioned by the governor, and shall receive such salaries and allowances as may be determined by law, the amount of which shall not be diminished during their term of office. Their terms of office shall commence on the first day of January next following their appointment; and they shall discharge the duties of their respective offices from their first appointment and qualification under this constitution until their terms begin.

SEC. 23. Judges may be removed from office by a concurrent vote of both houses of the general assembly, but a majority of all the members elected to each house must concur in such vote, and the cause of removal shall be entered on the journal of each house. The judge against whom the general assembly may be about to proceed shall have notice thereof, accompanied by a copy of the causes alleged for his removal, at least twenty days before the day on which either house of the general assembly shall act thereon.

SEC. 25. Judges, and all other officers elected or appointed, shall continue to discharge the duties of their offices after their terms of service have expired, until their successors have qualified.

AN ACT

To amend and re-enact sections 3, 4, 6, *and* 12 *of chapter* 154 *of the Code of* 1873, *in relation to the jurisdiction of County Courts.*

Approved April 2, 1874.

1. Be it enacted by the general assembly, That sections three, four, six and twelve of chapter one hundred and fifty-four of the Code of eighteen hundred and seventy-three, in relation to the jurisdiction of the county courts, be amended and re-enacted so as to read as follows:

"§ 3. There shall be held in each county of the commonwealth monthly a term of the county court, to be held at the times prescribed by law, and with the jurisdiction hereinafter provided. The court may, from time to time, change the day for the commencement of the terms thereof, and the clerk of such court, within thirty days after any change has been made in the day for the commencement of the terms thereof, shall send a copy of the order making it to the clerk of the House of Delegates.

"§ 4. The county courts may grant letters of administration, admit wills to probate, appoint guardians, curators and committees, and shall have jurisdiction of motions to appoint trustees in deeds of trust, as provided in section eight of chapter one hundred and seventy-four of the Code of eighteen hundred and seventy-three, and shall continue to have jurisdiction with the circuit courts, to hear and determine actions of unlawful entry or detainer; attachments under the third and fourth sections of chapter one hundred and forty-eight of the same Code, and of proceedings and motions for rent had or made, in pursuance of section fifteen of chapter one hundred and thirty-four of said Code, and of motions for judgments on forthcoming bonds taken under a warrant of distress; and said county courts shall have exclusive jurisdiction to hear and determine all appeals now allowed by law from the orders or judgments of a justice, unless it be in a

case involving the constitutionality or validity of an ordinance, or by-law of a corporation, of which appeals the said county courts shall have no jurisdiction; and exclusive jurisdiction of causes removed from a justice, in pursuance of section one of chapter one hundred and forty-seven of said Code; and of contested election cases for county and township officers in the manner and form as provided in section nine of chapter nine of the said Code, but with the right of appeal in all such cases to the circuit court, whose decision shall be final. The said county courts, or the judges thereof in vacation, shall have jurisdiction to grant writs of habeas corpus, ad subjiciendum. And said county courts shall have jurisdiction to hear and determine all motions and other matters made specially cognizable therein by any statute."

"§ 6. The county court shall execute, correct, revive and enforce by execution, suggestion or other process, in the manner prescribed by law, every judgment, decree or order made or entered in any cause that has been, or may hereafter be ended or determined therein, and shall have jurisdiction to hear and determine all motions for judgments on bonds given or taken under or in pursuance of process issued upon or by virtue of said judgments, decrees or orders, and shall supervise, correct and enforce, in like manner, any rule taken, or order, entry, or endorsement made by the clerk of said court; and said courts shall have authority to empanel juries for the trial of cases in said court where juries may be required. The jurors may be summoned from the by-standers, or from the body of the county, and from lists furnished by the judge of the court, unless he shall deem it proper to dispense with said list. Process of scire facias in the county court to revive a judgment under this section, shall be returnable to the first day of any term thereof, and final judgment thereon shall be entered, unless the defendant at the next succeeding term appears, demurs or pleads; in which case the issues shall be made up and all pleadings in the same filed in open court, and the court shall, in its discretion, proceed to hear the cause at said time, or continue the same."

"§ 12. All matters or things authorized by law to be done by or in the county court, may be done at any term thereof."

2. This act shall be in force from its passage.

AN ACT

To amend and re-enact sections 5, 8, 9, 10 *and* 11 *of chapter* 154 *of the Code of* 1873, *in relation to the Criminal Jurisdiction of County Courts.*

Approved March 29, 1875.

1. Be it enacted by the general assembly of Virginia, That sections five, eight, nine, ten and eleven of chapter one hundred and fifty-four of the Code of eighteen hundred and seventy-three, be amended and re-enacted so as to read as follows:

§ 5. The county court shall have exclusive original jurisdiction for the trial of all presentments, informations, and indictments for offences committed within their respective counties, and also of all informations, presentments, and indictments now pending in said courts; except that a person to be tried for arson, or any felony for which he may be punished with death, may, upon his arraignment in the county court, demand to be tried in the circuit court having jurisdiction over the county for which said county court is held. But no such demand shall be allowed in a corporation court in which capital felonies may now be tried. Upon such demand, the accused shall be remanded for trial in the said circuit court, and all the material witnesses desired, for the prosecution or defence, shall be recognized for their attendance at such trial. When a person is remanded as aforesaid by a county court, the clerk thereof shall certify and transmit to the clerk of the court in which he is to be tried, a record of the proceedings in the said county court in relation to the prosecution, and copies of the indictment, or other accusation, and of all recognizances and other papers connected with the case; such copies shall be used with the same effect as the originals. The clerk of the court in which the trial is to be had shall, as soon as may be, issue a venire facias, directed to the officer of said court, requiring him to summon jurors for such trial.

§ 8. When an indictment is found, or other accusation filed against a person for felony, in a court wherein he may be tried, the accused, if in custody, or if he appear according to his recognizance, shall, unless good cause be shown for a continuance, be arraigned and tried at the same term. When an indictment is found against a person for a felony, in the circuit court, if it be for a felony for which the accused has the right of election under the fifth section of this act, and if he be in custody, or if he appear according to his recognizance, he shall be arraigned in said circuit court, and upon his arraignment, shall have the right of election, as provided in the fifth section of this act. And if the indictment be for a felony for which the accused has no such right of election, he shall be remanded for trial in the county court, and all material witnesses desired for the prosecution or defence, shall be recognized for their appearance at such trial. If the accused is not in custody, or fails to appear according to his recognizance, the judge of the court shall issue a warrant to any sheriff, sergeant, or constable, commanding him to arrest such party, and carry him before a justice of the county in which he ought to be tried, and summon the witnesses for the prosecution to appear and testify before the justice. The justice before whom such warrant is returned, shall proceed in the case as if the warrant had been issued by himself.

§ 9. When the justice considers that there is sufficient cause for charging the accused with the offence, he shall commit him for trial, or bail him, if it be a case in which the party is entitled to bail. The commitment for trial, or recognizance for appearance, shall be to the next term of the court for such county in which the trial may be had, and the justice shall return to the clerk of the court from which the warrant issued, a certificate showing whether the accused was committed, or recognized for trial, or was discharged.

§ 10. When a person is remanded by a circuit court, or is sent on for trial by a justice, the clerk of the circuit court shall transmit to the clerk of the court in which he is to be tried, the indictment, and the indictment and all recognizances and other papers connected with the case, and a record of the proceedings had therein in the circuit court. Such papers and record shall be used with the same effect in the county court as they might be in the circuit court, if the circuit court had jurisdiction to try the offence. The clerk of the county court shall, as soon as may be, issue a venire facias directed to the

proper officer of the court, requiring him to summon jurors for such trial.

§ 11. If the accused has not been arraigned in the circuit court, if in custody, or if he appear in the county court, according to his recognizance, he shall, unless good cause be shown for a continuance, be arraigned and tried at the first term of the court to which he is remanded, or sent on for trial.

2. All acts or parts of acts in conflict with this act are hereby repealed.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

ORIGINAL, NO. 4.

EX PARTE COMMONWEALTH OF VIRGINIA AND J. D. COLES, PETITIONERS FOR HABEAS CORPUS.

BRIEF OF THE UNITED STATES ATTORNEY-GENERAL.

In the Supreme Court of the United States.

OCTOBER TERM, 1879.

ORIGINAL, NO. 4.

EX PARTE COMMONWEALTH OF VIRGINIA AND J. D. COLES, PETITIONERS FOR HABEAS CORPUS.

BRIEF OF THE UNITED STATES ATTORNEY-GENERAL.

STATEMENT.

J. D. Coles, judge of the court of Pittsylvania County, Virginia, is arrested and held upon an indictment found in the United States district court for the western district of Virginia, for excluding from the jury lists, officially made by him, certain persons solely "on account of their race, color, and previous condition of servitude, and for no other reasons." (Record, 1.)

Claiming a standing in court because of Judge Coles' judicial position, and the right the people of that State have to his services in that capacity, the commonwealth of Virginia petitions this court for a writ of *habeas corpus*, and to have him discharged from arrest.

Judge Coles also presents to you a similar petition in his own behalf.

BRIEF.

1. Who can apply to the Federal courts for a writ of *habeas corpus*?

2. Where, and how is the application to be made, and the writ to issue?

3. What circumstances require the issue of the writ and the discharge of the prisoner? Do such circumstances exist in the present case?

I.

R. S., "SEC. 753. The writ of *habeas corpus* shall in no case extend to a prisoner in jail unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution, or of a law or treaty of the United States," &c. * * *

The prisoner himself must make, sign, and verify the application therefor. (See R. S., sec. 754.)

II.

Application may be made, in appropriate cases, to either of the courts of the United States, or to any judge thereof.

R. S., "SEC. 751. The Supreme Court and the circuit and district courts shall have power to issue writs of *habeas corpus*."

"SEC. 752. The several justices and judges of the said

courts, within their respective jurisdictions, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty."

It is not meant by these provisions that application is to be made indiscriminately to either of these courts, at the election of the applicant.

1. This court will not issue a writ of *habeas corpus* as an exercise of its original jurisdiction; which is what is here asked of it. Congress had neither the power nor the intention to authorize such a course. (Marbury *v.* Madison, 1 Cranch, 174, 175, *et seq.*; Ex p. Watkins, 7 Peters, 572; Ex p. Barry, 2 Howard, 65: Ex p. Metzgar, 5 *Ib.*, 176; Ex p. Yerger, 8 Wallace, 85; Ex p. Parks, 93 U. S., 18.) There has been no action by, or application to, the court below.

2. The fact that the commonwealth of Virginia has filed a petition does not make it one of which this court has original jurisdiction.

The controversies to which a State is party, that Art. III, sec. 2, of the Constitution allows to be here heard are those arising "between two or more States; between a State and citizens of *another* State; * * * and between a State, or the citizens thereof, and foreign states, citizens or subjects." The present matter cannot be comprehended in this category; therefore the use of the name of Virginia cannot confer jurisdiction.

The proper form of application for the writ is set forth in R. S., sec. 754: "Application for writ of *habeas corpus* shall be made to the court, or justice, or judge, *authorized to issue the same*, by complaint in writing, signed by the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue

of what claim or authority, if known. The facts set forth in the complaint shall be verified by the oath of the person making the application."

The verification must be by some person liable to be indicted for perjury, if the statements contained in the application are found to be willfully false.

In any case the court will look into the interest of the State, where it claims to be a party. (Penn. *v.* Wheeling Bridge Co., 13 Howard, 559.) R. S., sec. 755, provides that the writ shall issue "unless it appears from the petition itself that the party is not entitled thereto."

Desire to obtain an equivalent for money paid—a creditor-interest—will not authorize the making of an application: nor will the interest which the State has in having the functions of the judicial department faithfully and promptly performed, for the benefit of her citizens.

In all cases except those specially mentioned jurisdiction is appellate, and not original, even though a State be a party.

"In one description of cases the jurisdiction of the court is founded entirely on the character of the parties, and the nature of the controversy is not contemplated by the Constitution. The character of the parties is everything, the nature of the case nothing. In the other description of cases the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the Constitution. In these the nature of the case is everything, the character of the parties nothing. When, then, the Constitution declares the jurisdiction in cases where a State shall be a party to be original, and in all cases arising under the Constitution or a law to be appellate, the conclusion seems irresistible

that its framers designed to include in the first class those cases in which jurisdiction is given because a State is a party, and to include in the second those in which jurisdiction is given because the case arises under the Constitution or a law." (Cohens *v.* Virginia, 6 Wheaton, 393.)

3. This court possesses no "supervisory" power over the circuit and district courts, such as is exercised by the courts of King's bench and by the supreme court of many of the States over the proceedings of inferior tribunals.

4. The issue of a writ of *habeas corpus* by this court is an exercise of its appellate jurisdiction. (Cases *passim:* Ex p. Watkins, 7 Peters, 568; Ex p. Milburn, 9 *Ib.*, 104; Ex p. Metzger, 5 Howard, 176; Ex p. Kaine, 14 *Ib.*, 103; Ex p. Yerger, 8 Wall., 85; Ex p. McCardle, 7 Wall., 506; Ex p. Parks, 93 U. S., 18.)

Its appellate power—the instances in which and circumstances under which it can be appealed to—are distinctly defined by law. Though this power is conferred by the Constitution, it is limited to those matters for which Congress has made express statutory provision. (Ex p. McCardle, 7 Wallace, 513; Ex p. Vallandigham, 1 Wallace, 251.)

"This court can exercise no appellate jurisdiction which is not given to it by statute." (United States *v.* Nourse, 6 Peters, 495.)

"This affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it." (Durosseau *v.* United States, 6 Cranch, 314.)

"The Supreme Court possesses no appellate power in any case unless conferred upon it by act of Congress; nor can it, when conferred, be exercised in any other form, *or by any other mode of proceeding*, than that which the law prescribes." (Barry *v.* Mercein, 5 Howard, 119; United States *v.* Curry, 6 *Id.*, 113; Wiscart *v.* Dauchy, 3 Dallas, 327; Forsyth *v.* United States, 9 Howard, 572.)

No court "can assert a just claim to jurisdiction exclusively conferred upon another, or withheld from all." (Sheldon *v.* Sill, 8 Howard, 449.)

The appellate power is distinct from a supervisory power. (Baxter *v.* Brooks, 29 Ark., 180, 181; Milliken *v.* Huber, 21 Cal., 169; Mead *v.* Thompson, 15 Wall., 638; Hall *v.* Allen, 12 Wall., 454; Morgan *v.* Thornhill, 11 Wall., 80; Palmer *v.* Dayton, 4 Cush., 270; Thompson *v.* Thompson, *Ib.*, 127; Harlow *v.* Tufts, *Ib.*, 452; Cheshire Iron Co. *v.* Gay, 3 Gray, 533; Hestres *v.* Brennan, 50 Cal., 211.)

The supervisory power, like the appellate, is entirely the creature of statute.

If this court could issue *habeas corpus* as a *supervisory* writ, it must be done as an exercise of original jurisdiction, in the exercise of an assumed power to regulate and control all proceedings in inferior Federal courts by some other precept than a writ of error or upon appeal. Not only has no such power been conferred by Congress, but the early case already cited declares that it is not competent to be done. Substituting "habeas corpus" for "mandamus," the language of that opinion answers this petition: "To enable this court to issue mandamus [habeas corpus] it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction." (Marbury *v.* Madison, 1 Cranch, 175.

5. No appellate jurisdiction can be exercised upon these petitions since there is nothing to appeal from. There has been no judgment in the court below. A direct appeal to this court from the finding of a grand jury is a thing without precedent.

"APPEAL.—When used with reference to proceedings in courts of justice, appeal signifies one mode of obtaining a review of a judicial decision." (1 Abbott's Law Dict., *h. t.*)

Burrill gives this definition: "The complaint to a superior court of an injustice done or error committed by an inferior one, whose judgment or decision the court above is called upon to correct or reverse." He also says: "An appellate jurisdiction necessarily implies that the subject matter has been already instituted in, and acted upon by, some other court whose judgment or proceedings are to be revised."

Abbott thus defines "Appellate: Pertaining to the judicial review of adjudications."

It is to be noted that the action of the district court is, under the act of March 3, 1879, c. 176 (20 Stats., 354), subject to review or appeal by the circuit court, whether subsequently reviewable here or not under the fifth section of the act of March 4, 1875, c. 114 (18 Stats.,336–7), printed *infra*.

The proposition of these petitioners is that this court shall go *per saltum* over the circuit court to reach the district court; and that, not waiting for the regular course of procedure, shall go at once, before Judge Rives or the circuit judge have had occasion or opportunity to act.

Judge Rives is entitled to an opportunity to act upon this case, and to pass some judgment thereon before

it is taken to this court in any way. Until he does so there can be no appellate proceeding.

In Jackson's case (96 U. S., 727–737, No. 6, Original, October term, 1877), there had been a verdict of guilty and judgment thereon. Judge Blatchford had also been applied to for *habeas corpus* while the accused was awaiting trial and had refused to release him because he found the statute constitutional and the commitment regular and lawful. True, the ground now taken was argued in that case, because the application to Judge Blatchford was before trial and there had been none after judgment. Under this state of facts the court proceeded to discuss the merits of the case upon the prisoner's application and at his request; though the closing paragraph of the opinion (p. 737) intimates that the applicant was not entitled to a decision upon the merits. In that case it was not necessary to consider whether or not the court might properly issue the writ, because the court were of opinion that the statute was constitutional, and that the circuit court had properly exercised its jurisdiction.

6. The legal conclusion from the decisions of this court, from the earliest to the present day, is this: *Original* jurisdiction exists only in those specified cases, and as to those particular persons enumerated in the Constitution, and it cannot be extended beyond these by any legislation; *appellate* jurisdiction is limited to those causes, questions, and methods declared and established by Congress. A *supervisory* power, neither original nor appellate, if it can be conceived of as a legal abstraction, finds no sanction anywhere either in the Constitution or the laws. The supreme court of California has so construed this phraseology. (Milliken *v.* Huber, 21 Cal.,

169; Wilcox *v.* Oakland, 49 Cal., 31; Hestres *v.* Brennan, 50 Cal., 211.)

Whenever appellate jurisdiction is exercised, under existing statutes, it must be either through the medium of a writ of error, or by appeal; if that appeal be by *habeas corpus*, it must be from a decisiou below upon a similar writ; nor will the fact that neither of these methods will meet the requirements of the supposed emergency justify the resort to any other. (Forsyth *v.* United States, 9 Howard, 572.)

If the act of March 4, 1875, c. 114, § 5, authorizes bringing the present case to this court for final review—after an appeal to the circuit court, under the act of March 3, 1879, c. 176—there is no propriety in anticipating the result to be reached by that course; if the act of 1875, c. 114, § 5, does not apply to criminal cases, so that it cannot be brought here by appeal or writ of error, the effect of those proceedings cannot be obtained by *habeas corpus*.

No supervisory power, properly so called, is known to us to exist, except the limited power given by R. S., Sec. 688, to issue writs of prohibition in certain defined cases, and writs of mandamus.

III.

Judge Coles himself has prematurely sought the interference of this court, which the judgment of the United States district court or of the circuit court, when obtained, might render unnecessary.

It is the right of the district court in the first instance to express its opinion upon the law and facts of the indictment found against Judge Coles.

It is enough that the district court had power to entertain the complaint. That gives jurisdiction. Power to decide that it must be dismissed because of the unconstitutionality of an enactment, or for any other reason, implies power to decide differently. It is jurisdiction. (Central Pac. R. R. Co. *v.* Placer Co., 43 Cal., 368–9; Ex parte Bennett, 44 Cal., 88; King *v.* Poole, 36 Barb., 242.)

The United States district court had conferred upon it by Congress jurisdiction over the subject-matter and over the person. Whether the statute under examination was constitutional or not was a question of law, arising in the case, to be primarily decided by that court, since no provision is made to anticipate its determination of legal propositions in any case. (Sheldon *v.* Newton, 3 Ohio St., 499; Ex p. Kellogg, 6 Vt., 509, 511; Ex p. Tracy, 25 Vt., 93, 96; Ex p. Greenough, 31 Vt., 279, 285; Ex p. O'Connor, 6 Wis., 288.)

"If a plaintiff obtain a judgment, and by his own showing has no cause of action, yet if the court had jurisdiction of the cause, it is only an erroneous judgment; but if the court has no jurisdiction of the cause, it is a void judgment." (McNamara on Nullities, 137, and authorities *passim*.)

"The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented that brings this power into action," &c. (United States *v.* Arredondo, 6 Peters, 709; King *v.* Poole, 36 Barb., 242.)

In 1870 the supreme court of Missouri said of an applicant for *habeas corpus*: "He was arrested and detained upon legal process by a court having jurisdiction of the person and the offense; he is in custody of the proper

officer, and by virtue of a provision of the law. The law to prevent the introduction of Texas cattle into the State during certain periods of the year was intended as a police and sanitary regulation, and whether the legislature exceeded its powers in the passage of that law we will not inquire in this proceeding. The petitioner can have his trial, and if he is dissatisfied with the verdict and judgment and desires to test the validity of the law the courts are open to him, as they are to all other persons charged with the violation of the laws of the land. Admit this proceeding, and then every person charged with committing an offense of every kind and description whatsoever, instead of standing his trial and litigating the matter as the law directs, can come here and ask our advice as to the validity of the law under which he is arraigned." (*In re* Harris, 47 Mo., 165. See also Ex. p. Fisher, 6 Nebr., 309.)

It is the *allegation* of facts which, under an act of Congress, constitute an offense, that authorizes the Federal courts to inquire into the truth of the allegation and the constitutionality of the law; especially when those facts are regularly presented to the court by a grand jury. In Blyew *v.* United States this is recognized. The opinion says: "If, therefore, they are persons affected by the cause, whenever they might be witnesses, were they competent to testify, it follows that, in any suit between white citizens, jurisdiction might be taken by the Federal courts whenever it was *alleged* that a citizen of the African race was or might be an important witness. And such an allegation might always be made. *So in all criminal prosecutions a similar allegation would call into existence the like jurisdiction.*" (13 Wall., 592.)

A case in which one party asserts and the other de-

nies the validity of a Congressional enactment, vital to the maintenance of the action, is one arising under the Constitution and laws of the United States, of which the Federal courts must have jurisdiction. (Mayor *v.* Cooper, 6 Wall., 252, 253.) What authority has this court to determine the constitutionality of any act of Congress that is not in like manner conferred upon the subordinate tribunals? If the assertion of the unconstitutionality of a law ousts the jurisdiction of the district court, how can this court take cognizance of it? What greater right has this court, in the first instance, as between party and party, to determine the constitutional character of legislation than the lower courts have? All Federal tribunals alike derive their authority from the Constitution—"that pure fountain from which the jurisdiction of all the Federal courts is derived" (Am. Ins. Co. *v.* Canter, 1 Peters, 545)—and the laws made in pursuance thereof. Therefore, in causes like the present, this court has no jurisdiction, in the first instance, and the lower courts have it all; because it is there deposited by the Constitution and laws which govern them all.

To say that this statute, now to be examined, is unconstitutional, is to assume the vital question involved in the case.

To repeat: If the lower court had no jurisdiction, because of the unconstitutionality of the statute, neither has this; if this court has jurisdiction so far as to inquire into the constitutionality of the statute, where it comes collaterally in question upon *habeas corpus*, certainly the court below has the power, duty, and *right* to institute the same inquiry upon the indictment, where it is directly involved. The determination of that ques-

tion should not be had here in anticipation of the decision of the court below. In fact, it rests *exclusively* with the court below, except where error or appeal lies.

The supreme court of Wisconsin, in the matter of Sherman M. Booth, declined to accede to the proposition then presented, upon which the present petitions rest, viz, "That no court can have jurisdiction to try a person for an alleged violation of a void statute." That court replied thus to the suggestion: "But it is to be remembered that that court (the United States district court), having the case pending before it, is of necessity compelled to decide every question which the case involves, that of its own jurisdiction included." (Ex p. Booth, 3 Wisc, 145.) Nor was this proposition controverted in the opinion given in this case when it reached this court.

In Ableman *v.* Booth (21 Howard, 519, 520), Taney, C. J., calls attention to the language of the Constitution declaring "this Constitution and the laws of the United States which shall be passed *in pursuance thereof*" the supreme law of the land, and compares it with the terms in which jurisdiction is conferred upon the Federal courts, in which the words above italicized are omitted. Italicizing these three words in his quotation of them, the Chief Justice thus proceeds in his opinion: "The words in italics show the precision and foresight which marks every clause in the instrument. The sovereignty to be created was to be limited in its powers of legislation, and if it passed a law not authorized by its enumerated powers, it was not to be regarded as the supreme law of the land, nor were the State judges bound to carry it into execution. And as the courts of a State, and the courts of the United States, might, and,

indeed, certainly would, often differ as to the extent of the powers conferred by the general government, it was manifest that serious controversies would arise between the authorities of the United States and of the States, which must be settled by force of arms, unless some tribunal was created to decide between them finally and without appeal. The Constitution has accordingly provided, as far as human foresight could provide, against this danger; and in conferring judicial power upon the Federal Government it declares that the jurisdiction of its courts shall extend to all cases arising under 'this Constitution' and the laws of the United States, leaving out the words of restriction contained in the grant of legislative power which we have above noticed. *The judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated powers, or be an assumption of power beyond the grants in the Constitution.*" (21 Howard, 519, 520.)

Power over the person under *any* act of Congress is jurisdiction.

The same position is restated by Mr. Justice Swayne in Mayor *v.* Cooper (6 Wall.).

If a judgment is absolutely *void*, then *habeas corpus* would lie to release one from imprisonment under it; if good until reversed, as would be the case here, *habeas corpus* will not prevent its execution. (See 3 Peters, 202, and other cases cited *supra* and *infra;* Ex p. Bushnell, 9 Ohio St., 183; Ex p. Williamson, 26 Penn. St., 9; People *v.* Orser, 12 Howd. Pr. (N. Y.), 550; Ex p. Baker, 11 Howd. Pr., 425–6; Ex p. Prime, 1 Barb., 349, 350; People *v.* Cavanagh, 2 Abb. Pr., 85; People *v.* McCormack, 4 Parker's Crim. Cas., 9; Ex p. Van Aernam, 3 Blatch., 160.)

For causes of detention arising *after* judgment and execution, the writ may issue (People *v.* Cavanagh, 2 Parker's Crim. Cas., 650); that is, for a cause arising or existing after the decree and jurisdiction of the court is exhausted, as it was in Lange's case (18 Wall., 163). There the court had exhausted its power, and had no further authority or jurisdiction over the *person* or *cause*. (93 U. S., 23.)

It may be urged that the lower court, having jurisdiction over the person and cause, its judgment cannot be void, nor can it be reversed, in a criminal case like the present, because no writ of error will lie to bring it here (Ex parte Parks, 93 U. S., 18); and thus a man may be imprisoned or fined under an act of Congress which this court, if that act could be brought before you for consideration, would think unconstitutional. If that were so, the answer to that suggestion would be that the citizen is only entitled to a hearing before, and to the judgment of, that tribunal which the Constitution and laws have designated as the arbiters of his cause, whether it involve a constitutional question or not.

Congress has, and has exercised, the power to permit the subordinate courts to decide without appeal to this court questions of constitutional law arising in certain civil and criminal cases. If recourse can be had to this court in criminal cases arising under the act of March 4, 1875, c. 114, by virtue of its fifth section, this privilege is an exception to the usual course of Federal criminal procedure.

Whether it would be proper to allow all parties an appeal to this court from the district or circuit court where a constitutional question is involved is a proper subject for legislative consideration; but it may be re-

marked that the mode by which such inquiries are brought into this court by certificate of decision from the circuit court, has for ninety years been found satisfactory and amply sufficient to guard all parties in their constitutional rights. No reason is perceived why, in this case, which may be brought into the circuit court by appeal, this course may not be sufficient to protect the rights of the defendant.

No man has a right to your judgment, unless that right is given by law. (United States *v.* Nourse, 6 Peters, 495, middle; Durosseau *v.* United States, 6 Cranch, 314; Wiscart *v.* Dauchy, 3 Dallas, 327; Barry *v.* Mercieu, 5 Howard, 119, bottom; United States *v.* Curry, 6 *ib.*, 113, bottom; Forsyth *v.* United States, 9 *ib.*, 572; Ex p. Vallandigham, 1 Wallace, 251; Ex p. McCardle, 7 *ib.*, 513.)

Within their spheres of final jurisdiction, the inferior Federal courts possess like powers, derived from the same source, with the highest; and their ultimate decrees have the same sanction. It is, therefore, not properly to be considered a hardship that a party has no appeal from the adverse judgment of whatever tribunal the law has made final arbiter of his dispute. In a civil case in the circuit court involving but $5,000 it is no more a hardship that the losing party must abide the event than it is in a cause where a larger sum is in dispute that the winner there cannot retain his judgment, but is liable to have it reversed here.

The highest penalty that can be inflicted under act of March 4, 1875, c. 114, § 4, is $5,000—the sum required to authorize the appeal of a civil case.

So, in a criminal case, it is no hardship that a different court than this renders final judgment—unless a person accused should be allowed to go from court to

court until he found a favorable decision. Could both parties appeal in such cases, one acquitted below might not fare so well here. That no injustice has resulted from the existing legislation upon this subject can well be supposed from the fact that it has been in operation, without complaint, for nearly a century.

The last section of the act of March 4, 1875, c. 114, is: "SEC. 5. That all cases arising under the provisions of this act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are now provided by law for the review of other causes in said court." (18 Stats., 337.)

But if that section will not permit the case to come here for review or upon appeal, after the facts have been ascertained below, that will not justify present interference, nor be any hardship upon the respondent.

This point was well stated by the Solicitor-General in the Doom case.

"There being no constitutional authority for punishing an innocent man, he who is in prison upon the misinterpretation of a statute is there as much in violation of the Constitution as he who is there in execution of an unconstitutional statute. In either case there is no law for the sentence. The former case shocks public opinion as much as the latter, is equally vexatious to the person involved, and equally dangerous to common right.

"In Parks's case, however, this court has said in effect that allegations of *nullity* against the sentence below because of misinterpretation of the statute mainly in-

volved, are for any practical purpose inadmissible, because by our system the *finis litium* in that respect is in the court below—or rather, that the court which has decided is not in that respect a court *below*, but, on the contrary, is a court of *last resort*.

"In the absence of legislation making a distinction between the administration of *constitutional* questions, and other legal questions equally important to the accused, it seems that both classes are equally confided to the judgment of the circuit court. Under a constitutional government constitutional questions become ordinary matters of consideration in courts of all grades, and it s to be presumed that all courts are competent to meet and dispose of them, and, as I have already said, in the absence of legislation giving a review thereof, equally competent to give them final determination. (Ex parte Wilkins, 7 Pet., p. 573.)

"The question is not whether the court below has *usurped* a portion of the general jurisdiction of the United States, but whether that general jurisdiction itself is competent; *i. e.*, in the present case the jurisdiction of the circuit court fails only if the jurisdiction of the United States fails.

"No one can practically deny to the United States any jurisdiction asserted *by them*, *i. e.*, by tribunals intrusted in the last resort with the power of making such assertion.

"The check upon unconstitutional legislation applied by the judiciary does not necessarily reside in the Supreme Court, nor has that court universally the power of reviewing the manner in which such check may have been applied by other tribunals. Its powers in that respect vary with different cases, and in general depend upon some statute.

"I submit that in the present condition of statutory law the question whether the act under consideration be constitutional is intrusted to the circuit court, without appeal. In other words, that as regards any particular case decided in those courts, every department of the government must take such act to be constitutional.

"The contention by the government here is that, for any purpose of practical relief, no tribunal competent to pass without appeal upon the questions *Constitutional* or *unconstitutional? Legal* or *illegal?*, can violate the Constitution or the law.

"The circuit courts of the United States are not *inferior* in the sense in which that word is used by the authorities to denote certain courts whose jurisdiction is questionable collaterally, and is liable to unfavorable presumptions. As the United States themselves, although possessing enumerated powers, have within those powers (including the right of deciding what they are) all the sovereign *quality* which any governments have, so the circumstance that their higher tribunals are confined by whatever confines themselves, does not disentitle the latter to the favorable presumptions possessed in general by tribunals of superior jurisdiction." (See Skinner *v.* Moore, 2 Dev. & Batt., 144.)

IV.

Though we believe it entirely for the inferior court to decide upon the constitutionality of the law upon which the present indictment is found, yet as the petitioners have raised and discussed that issue, and the court did consider a similar one in Jackson's case (96 U. S., 727), we will address ourselves briefly to that subject.

The recent amendments to the Constitution, so far as they relate to this matter, and the act of which the constitutionality is questioned, are as follows:

ARTICLE XIII.

"1. Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction.

2. Congress shall have power to enforce this article by appropriate legislation."

ARTICLE XIV.

"SEC. 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. *No State shall make* OR ENFORCE *any law which shall abridge the privileges or immunities of citizens of the United States;* nor shall any State deprive any person of life, liberty, or property without due process of law, *nor deny to any person the* EQUAL *protection of the laws.*"

* * * * *

"SEC. 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

The concluding sections of the act of March 4, 1875, c. 114, are these:

"SEC. 4. That no citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or

fail to summon any citizen for the cause aforesaid, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than five thousand dollars.

"SEC. 5. That all cases arising under the provisions of this act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are now provided by law for the review of other causes in said court." (18 Stats., 336, 337.)

Attention is called to these two sections of the Revised Statutes:

"SEC. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." * * *

"SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States, or other person within the jurisdiction thereof, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

These latter provisions, now incorporated in the Revised Statutes, were originally part of the civil-rights act,

approved April 9, 1866 (14 Stats., 27), passed under the thirteenth amendment, and re-enacted May 31, 1870 (16 Stats., 144), after the adoption of the fourteenth amendment.

They all evidently contemplate a protective legislation by Congress to prevent interference by the States with the rights of a citizen, not only by adverse statutes, but by customs, usages, &c.

The amendments were not only the result of a great civil convulsion, but were innovations upon the previous course of the government and of legislation in authorizing Congress to interfere between the State and its citizens, and to legislate so as to preserve the freedom, privileges, and rights of the citizens from invasion or curtailment by the State.

Before these amendments were passed, from the time the Constitution first went into operation, Federal authority has been exercised over the action of State courts. "Nor can such a right be deemed to impair the independence of State judges. *It is assuming the very ground in controversy to assert that they possess an absolute independence of the United States.* In respect to the powers granted to the United States they are not independent; they are expressly bound to obedience by the letter of the Constitution," &c. (Martin *v.* Hunter, 1 Wheaton, 344.)

Article VI, declaring the supremacy of the Constitution and laws made in pursuance thereof, says that "the *judges* in every State shall be bound thereby," &c., not mentioning by name of office any other of the State functionaries.

The amendments were not simply declaratory, without provision for carrying them into effect, but it was con-

templated that Congressional action should secure freedom and prevent any abridgment by the State of the privileges and immunities of citizens and any denial of the equal protection of the laws.

Even without the provisions that Congress should enforce the amendments by appropriate legislation, Congress would, under the general authority of the Constitution, have that power. These provisions emphasize such power, and show that the amendments of the Constitution, so far as they bore upon the States, were not left to the enforcement of the States alone; but that the rights guaranteed by them to the people of the United States was committed to the guardianship of Congress.

In Blyew *v.* United States (13 Wall., 581), it was held that under the civil-rights bill of April 9, 1866, a criminal prosecution is not to be considered as "affecting" those who were merely witnesses. It was there said "that a criminal case affects nobody but the party accused and the public." (13 Wall., 587.) In the present instance the total omission of colored citizens from the jury-lists, solely on account of "race, color, and previous condition of servitude," did affect the parties entitled to be placed thereon, and all of their race whose civil rights and personal liberty might become the subject of litigation in causes committed to such juries.

True, jury service is a duty as well as a right; but it is a duty in which it is for the interest of colored men to participate. Without participation in this, they are not under "the equal protection of the law" which it is the duty of Congress to secure to them, as against the State, by appropriation legislation.

It may be observed that the constitution of Virginia

confers upon all her citizens equal civil and political rights, regardless of color; and that no State legislation discriminates between the races in the selection of jurors; but it is required of the judges of the county or corporation courts annually to "prepare a list of such inhabitants of the county or corporation, not exempt, as he shall think well qualified to serve as jurors, being persons of sound judgment and free from legal exception." And it will be argued that "the State alone has a right to determine who shall serve as jurors in her own court."

The answer is, that it is against the State that the prohibitions of the fourteenth amendment are directed, and it contemplated that they shall be enforced by Congressional enactments and interference.

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States," &c.

What is the "State," within the fair meaning of this provision? "That the word 'State' is not confined in its meaning to the legislative power of a community is evident, not only from the authority just cited (Texas *v.* White, 7 Wall., 720–1), but from a reference to the various places in which it is used by the Constitution of the United States. A few only of these will be referred to." (United States *v.* Reese, 92 U. S., 249, per Hunt, J., dissenting.) Upon the bottom of the next page (250) he refers to the provisions that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State." "By whom? By the sovereign State, by its agencies and authorities." Then he observes that the courts of one State must give full faith and credit to the proceedings

of the courts of another State. For this purpose, the court is the State. The State can only act by its agents and officers, and when these, in the discharge of a duty reposed in them by the State, violate the principles of the fourteenth amendment and the express requirements of appropriate legislation intended to carry these amendments into effect, it is done by the State. No possible enactment of Congress can be appropriate or effective to carry out the ideas embodied in these amendments unless it can be made to operate upon some individual. It is competent not only to annul antagonistic State legislation, but to punish administrative disregard of statutes passed to carry out the purposes of these amendments.

In Virginia, as in many other States, the decisions of the court constitute and embrace more of the law applicable to the administration of justice and to the daily affairs of common life than will be found upon the pages of the statute book. These decisions are the laws of the State. Those who promulgate them speak with the voice of the State. To that extent, in their official action, they are the State. "The decisions of the courts of the United States within their sphere of action are as conclusive as the laws of Congress made in pursuance of the Constitution." (Mayor *v.* Cooper, 6 Wall., 253.)

The amendment (fourteenth) says "no State shall make or *enforce* any law," &c. The enforcement of any law must be through the courts and its officers. "Force, which acts upon the physical powers of man, or judicial process, which addresses itself to his moral principles or his fears, are the only means to which governments can resort in the exercise of their authority." (Martin *v.* Hunter, 1 Wheaton, 363.)

Of the fourteenth amendment, as of that guaranteeing a republican form of government, it may be said, in the language of Mr. Justice Hunt, it "is a guaranty to the *people* of the State, and may be exercised in their favor against the political power called 'the State.'" (92 U. S., 251.)

In his Essay on the Constitution and Government of the United States, Mr. Calhoun, arguing the invalidity of the twenty-fifth section of the judiciary act, because of the supremacy thus given to Federal over State laws and authority, remarks that "the laws and the acts of the government and its departments, if opposed, reach the people individually only through the courts." This obvious truth makes it apparent that any legislation which should prevent the State courts and authorities from disregarding and practically annulling the fourteenth amendment, in its actual operations, would be "appropriate."

The Solicitor-General thus stated our position in his brief in Doom's case, which never came to a hearing:

'In interpreting the above constitutional provision it seems:

"I. That by the phrase 'any State' is meant, or at all events included, whatever agency *authorized by the State* in any case acts immediately upon 'life, liberty, or property.' *Whoever by virtue of public position under a State deprives another of property, or liberty, or life, without due process of law, thereby violates the law of the United States.* It is the duty of the State to see that those who are clothed in any degree with its powers do not commit such offenses; and if it do not, the United States interfere to punish the offender.

"II. The above principle applies to all persons, no

matter how humble the grade of their office, who have for a shorter or longer time a position which confers power over public privileges. As between the United States and the offender, it will be enough to show that really (or perhaps even in pretense) in passing upon the rights which he has violated he was administering a function derived from the State."

We may add, that whoever deprives one of his right to be placed upon the jury, or deprives the accused or litigant of his right to be tried or heard before an impartially, legally drawn jury commits an offense within the purview of the fourteenth amendment and of appropriate legislation thereunder.

In his very able and valuable opinion upon the queue ordinance, Mr. Justice Field, after quoting the first section of the fourteenth amendment, says:

"*This inhibition upon the State applies to all the instrumentalities and agencies employed in the administration of its government;* to its executive, legislative, and *judicial* departments; and to the subordinate legislative bodies of cities and counties. And the equality of protection thus assured to every one whilst within the United States, from whatever country he may have come or of whatever race or color he may be, implies not only that the courts of the country shall be open to him upon the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others, and that, in the administration of criminal justice, he shall suffer for his offenses no greater or different punishment. Since the adoption of the fourteenth amendment Congress has legislated for the pur-

pose of carrying out its provisions in accordance with these views.

Some of these provisions are recited by the learned judge, who then adds: "It is certainly something in which a citizen of the United States may feel a generous pride that the government of his country extends protection to all persons within its jurisdiction; and that every blow aimed at any of them, however humble, come from what quarter it may, is caught upon the broad shield of our blessed Constitution and our equal laws."

It is idle to argue that there is no discrimination, because the statute makes none, or because white men are tried by white jurors. If all colored men are excluded by Judge Coles from the jury lists made up by him solely on account of race, color, or previous condition, this is a discrimination, and one made by the State through its only agent that can make it.

In his opinion declaring the invalidity of the queue ordinance of the city and county of San Francisco, Mr. Justice Field thus alludes to an attempt to argue that the ordinance did not discriminate against a class because couched in terms apparently of universal application:

"The class character of this legislation is none the less manifest because of the general terms in which it is expressed. * * * Besides, we cannot shut our eyes to matters of public notoriety and general cognizance. When we take our seats on the bench we are not struck with blindness, and forbidden to know as judges what we see as men; and where an ordinance, though general in its terms, only operates upon a special race, sect, or class, it being universally understood that it is

to be enforced only against that race, sect, or class, we may justly conclude that it was the intention of the body adopting it that it should only have such operation and treat it accordingly. We may take notice of the limitation given to the general terms of an ordinance by its practical construction as a fact in its history, as we do in some cases that a law has practically become obsolete. If this were not so the most important provisions of the Constitution, intended for the security of personal rights, would, by the general terms of an enactment, often be evaded and practically annulled."

By Blackstone's definition "trial by jury is the unanimous suffrage of twelve of one's equals and neighbors, indifferently chosen and superior to all suspicion."

It is said by Lord Commissioner Maynard "to be the subject's birthright and inheritance, as his lands are, and without which he is not sure to keep them, or anything else; * * * his fence and protection against all frauds and surprises and against all storms of power."

An English writer has said, "the whole establishment of King, Lords, and Commons, and all the laws and statutes of the Realm, have only one great object, and that is to bring twelve men into a jury-box." "This," says Mr. Forsyth, "is hardly an exaggeration. For to what end is the machinery of the Constitution employed but to give every man his due, and protect all in the enjoyment of their property, liberty, and rights? And the twelve men in the jury-box are in this country the great court of appeal, when, in case of the humblest as well as the most exalted citizen, those or any of them are attacked." (Forsyth, Trial by Jury, 341.)

As to the importance and character of the trial by

jury, and upon the question whether it is the equal right of every free citizen, we call attention to Magna Charta, cap. 29 (as divided by Coke); Coke's Institutes, part 2, p. 45, part 1, s. 189, part 2, p. 28; as to the meaning of jurors, 3 Blackstone Com., 360, 379–381; Forsyth's Trial by Jury, 230–240; Finlason's Introduction to Reeve's Common Law, xcviii, 1 Reeve, 285; Constitution, art. 3, amendments v, vi, vii; Story on the Constition, sections 1779–1785.

It is believed that in every State constitution the trial by jury is guaranteed as one of the indefeasible rights of every free citizen. (Constitution of Massachusetts, Arts. XII, XV; Constitution of New Hampshire, Arts. 15, 16, 17, 20; Constitution of Virginia, Art. I, §§ 10, 13; Constitution of West Virginia, Art. III, §§ 10, 13, 14.)

This trial, to be worth anything, must be impartial and without discrimination, at least (whatever may be the qualifications assigned to jurors) against the race or color of the freeman to be tried.

If it be said that this is not the act of the State which deprives colored men of their rights in the jury-box, and colored men of their right to juries from which all of their race and color are not excluded, it should be observed by the resolutions of the State of Virginia, and by her petition, that she is engaged in vindicating the acts which these judges are doing, in creating and enforcing such exclusion.

CHARLES DEVENS,
Attorney General.
EDWIN B. SMITH,
Assistant Attorney General.

In the Supreme Court of the United States.

No. 4—ORIGINAL.

EX PARTE, IN THE MATTER OF THE COMMONWEALTH OF VIRGINIA AND J. D. COLES, PETITIONERS FOR WRIT OF HABEAS CORPUS.

BRIEF AND ARGUMENT OF W. WILLOUGHBY, ON BEHALF OF UNITED STATES, AGAINST POWER TO ISSUE WRIT.

In the Supreme Court of the United States.

No. 4—ORIGINAL.

EX PARTE, IN THE MATTER OF THE Commonwealth of Virginia and J. D. Coles, petitioners for writ of *habeas corpus*.

BRIEF AND ARGUMENT OF W. WILLOUGHBY, ON BEHALF OF UNITED STATES, AGAINST POWER TO ISSUE WRIT.

It is certainly a novel idea that a writ of *habeas corpus* should issue upon the petition of a State in behalf of one of its citizens, and that in behalf of such citizen it should invoke the original jurisdiction of this court, which by the Constitution is allowed to the State only in controversies between two or more States, between a State and citizens of another State, and between a State and foreign states, citizens, and subjects.

I do not, however, propose to discuss this, as it seems to me, that if the petitioner, Coles, presents a case proper for the issuing of the writ, his own petition, in

his own behalf, would be sufficient, without undertaking to avail himself of those privileges accorded to his State as a State.

Passing by the question as to whether there should have been a previous application for the writ to the district court, and by other questions which may be presented by others, I desire to discuss only the question as to whether a case is presented which would justify this court in issuing the writ, and in so doing I rely upon the want of power of this court to supervise or control the inferior court in a criminal cause in any way, except by a certificate of division of opinion under section 697 of the Revised Statutes of the United States.

The statute has provided that this court may issue "writs of *habeas corpus* for the purpose of an inquiry into the cause of restraint of liberty." (Sec. 752.) Under this statute applications have frequently been made, and upon the subject of jurisdiction a number of decisions have been made generally by a divided court, and from these and the language used in delivering the opinion results a great difference of opinion as to the extent of such jurisdiction; but the following rule seems to me to be consistent with the statute, and with all of the authorities upon the subject, to wit: *That no action, decision, or question which a criminal court has power to make or adjudge at the trial, affecting the guilt or innocence of the accused, can be anticipated or reviewed by this court.*

It is well settled that while the writ of *habeas corpus* may be issued by this court, yet it is only by the exercise of an appellate power. There must have been some action or decision of a court to which its appellate power extends. The question is, what actions or decisions of the inferior court may be passed upon by this court by

virtue of this writ, and upon what grounds the judgment of this court may be invoked.

Let us examine the principal authorities upon this question of jurisdiction, applying to them the test of this rule.

In Hamilton's case (3d Dallas) a party charged with high treason was *admitted to bail*. This was purely a question of "restraint of liberty." There was no decision upon any question affecting the guilt or innocence of the prisoner *upon the trial*. No *such* question was before the court. It was sitting simply in the capacity of committing magistrates.

In Burford's case (3d Cranch) there was no *trial* in fact or in contemplation. There was no question before the court but that of imprisonment. But even in such a case it is quite strongly intimated that if there had been a hearing of the case *de novo* by the circuit court, this court would have been concluded by its action.

In Bollman and Swartwout's case (4 Cranch, 75) the question of jurisdiction was thoroughly examined, and the distinction made which I have endeavored to express, and which I think has never been departed from by this court. The question before the court, it will be observed, was only a question of bail. To determine this nothing was examined or passed upon but the evidence. This, of course, has no relation to the evidence which may be used *upon the trial*. When the party is before a court sitting as a committing magistrate no authoritative decision can be made which could have any binding force *at the trial*. It is then only a question of *probable cause*.

The court say: "The question brought forward on a *habeas corpus* is always distinct from that which is in-

volved in the cause itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried and may be decided in different courts." In this case the court say, at the close of the opinion, that its decision to discharge the accused had no effect upon the trial, and was no objection to a trial. No decision was made nor could have been made affecting the trial, nor upon any question which was proper to be passed upon *at the trial.* It would not be claimed that refusing to hold to bail or to discharge could have any effect *at the trial.* Suppose that the Supreme Court should discharge the petitioner charged with an offense from imprisonment, and notwithstanding this the court below should go on with the trial, as in Virginia it may do in the absence of the accused in case of misdemeanor, and should convict him and sentence him to imprisonment, what could be done about it? This court could do nothing, and therefore it would not attempt to make an authoritative decision which could have no force only by way of advice.

In Kearny's case (7 Wh., 38) the court refused the writ where the petitioner was in contempt of the circuit court in refusing to answer a question. The court say: "The objection is not that the court acted beyond its jurisdiction, but that it erred in its judgment of the law. This would be asserting a right to control a criminal court and to revise its opinion. This court cannot revise such a judgment or the proceedings which lead to it."

In the case of *Tobias Watkins* (3 Peters, 193) the motion was founded "upon the allegation that the indictment *charged no offense* for which the prisoner was punishable in the court below, or of which the court

could take cognizance, and consequently that the proceedings were *coram non judice* and totally void." But this court held that the judgment was conclusive as to the *law* as well as to the facts. "To determine whether the offense charged in the indictment be *legally* punishable or not is among the most unquestionable of its powers and duties. The *decision of this question* is the exercise of jurisdiction, whether the judgment be for or against the prisoner. It must remain in full force until reversed regularly by a superior court *capable* of reversing it." (See page 207; also *ex parte* Watkins, 7 Peters, 574; *ex parte* Gordon, 1 Black, 503.)

In re Kaine (14 How.), at page 129, the court says: "The circuit court has power upon its own views of the law to inflict not only punishment but even the punishment of death without appellate control by this court. Even when it is alleged that the proceedings of a circuit court by which a citizen is imprisoned are *coram non judice* and void its judgment is final, and no relief can be had here by writ of error or appeal or by *habeas corpus*."

In *ex parte* Parks it was claimed that the indictment did not set out an offense against the United States, and that for that reason the court did not have jurisdiction to try it. This court said that this was one of the very questions which was to be submitted to the circuit court, and that for that very reason such a question could not be considered on an application for a writ of *habeas corpus*. Counsel admit that it is the sole province of the inferior court to pass upon the *construction* of a statute, but attempt to distinguish this from passing upon the constitutionality of an act. But why is not the question of the *constitutionality* of an act as much of a judicial

question for the circuit court to pass upon as the *construction* of an act? If the court is trying the prisoner upon a charge which is *no offense*, does it matter whether such charge is no offense because there is no act of Congress against it, or because, if there is such an act, it is unconstitutional? Would not the charge be as absolutely void in one case as in the other?

In both cases it is a question for the court to pass upon *at the trial*. This question is for such court alone. Whether wisely or unwisely it is not submitted to this court. In this respect the two courts—the circuit court and the Supreme Court—are independent of each other, and this court must be concluded by the action of the court. What, then, is meant by the declaration that this court can interfere where the circuit court has no jurisdiction, or where it has acted beyond its powers? Let us look at some of the cases where the jurisdiction of this court has been maintained.

The cases of *ex parte* Lange (18 Wall.) and *ex parte* Yerger (8 Wall.) are cases relied upon by the petitioner to sustain the jurisdiction to issue the writ.

In Lange's case the decision of this court was that the circuit court had undertaken to imprison the petitioner *after* he had fully and completely satisfied the judgment of the court itself. The court had adjudged the payment of a fine *and* imprisonment when it could lawfully impose but one—fine *or* imprisonment. *After* he had paid the fine, and it had been paid into the Treasury, so that it could not be returned, the court undertook to change its sentence and impose imprisonment without relieving him from the punishment already inflicted and *fully executed*. This the circuit court had no *power* to do. This want of power is illustrated by a court under-

taking to impose a punishment of death in a case of libel; also by the case of Bigelow *vs.* Forrest, 9 Wall., where the court undertook to confiscate the fee when the statute allowed the confiscation only of a life estate. This as to the excess was held to be void even in the collateral action of ejectment.

Suppose that a statute imposes as a punishment of an offense described by it imprisonment for one year, and that for this offense the circuit court should impose an imprisonment of three years. We can readily see how this would be *beyond the power of the court.* It can easily be seen, too, how, in such a case, the question of imprisonment merely is entirely distinct from any question which has been submitted by law to the inferior court and from the question of guilt or innocence.

In *ex parte* Lange the turning point seems to have been that one legal sentence had been *fully satisfied* before any attempt was made to impose another, and *after this* such change could not be made even by the same court. But no attempt was made to impeach the *judgment* or to question any matter passed upon prior to the judgment. The question was as to the *sentence.* It will be seen that this is no violation of the rule I have attempted to define.

In *ex parte* Yerger (8 Wall.) the simple question was whether the petitioner was in military custody or in the custody of the court. He had applied to the circuit court to be relieved from military custody, and had been remanded by order of the circuit court, and then he applied to this court for the writ, and it was held that he was in custody under the order of the court, and *therefore* by a tribunal over which this court had *appellate* jurisdiction. No question of guilt or innocence or affecting it was considered.

The case of *ex parte* Bradley (7 Wall.) has been cited to show that this court will review the action of the inferior court when acting beyond its powers and jurisdiction. This was the case of an application for a mandamus. One court had undertaken to disbar Mr. Bradley as an attorney for a contempt committed *before another court.* There was no judgment that he had committed a contempt before the court that had passed the order to disbar him. Justice Miller seemed to think that the order of the court did not show that it was for a contempt committed before *another* court, and therefore dissented, but in this the majority of the court disagreed with him.

In all of these cases it can be seen that this court does not review any question which the law had submitted to the judgment of the circuit court or which it was its duty to pass upon *at the trial.*

The question whether an act of Congress presenting an offense and declaring the mode of trial is constitutional is a *question* submitted to the judgment of the circuit court alone. It is most plainly a question relating to the guilt or innocence of the prisoner to be passed upon by the court at the trial. Such a *question* is within the jurisdiction of the court, and its judgment thereon is final whether erroneous or not.

Let us look a little more closely at the proceedings of a criminal cause. They can be divided into these two classes: those that relate to the punishment or imprisonment, or those that relate to the guilt or innocence of the accused, the question at issue and to be determined at the trial.

The question of bail before trial is only a question of probable cause, and the judgment of the court as to this

question has no connection with the judgment of the court upon the trial. If the only purpose here were to admit to bail, perhaps this court would for such purpose have jurisdiction, for its judgment on such a question would not be an interference with the judgment of the court at the trial; but such is not the purpose, for in fact the accused is not imprisoned and is practically already bailed for trial. The object here is to prevent a trial and to get an authoritative decision for the purpose of controlling the action of the court at the trial. There has been no refusal by the court below to admit to bail.

Again, *after* the trial, and when the court has passed its judgment as to whether an offense has been committed within the law or the Constitution, which questions, we say, are committed to the court below alone, and the decision of which is binding upon all other courts, whether erroneous or not, then another and distinct question is presented to the court, and that is as to the *sentence*. This is a distinct matter from the judgment. So far as the court acts within the discretion committed to it by the law in passing the sentence its decision upon this is binding upon other courts. But if it then sentences the prisoner to a term of imprisonment not allowed by the law, as to this the Supreme Court can correct it. When the court exceeds its powers, such an excess of power is subject to correction by *habeas corpus* or *mandamus*, whichever may be the appropriate remedy. It is in such cases only that the Supreme Court has assumed jurisdiction.

If the court releases an imprisoned party *after* trial and judgment, its power is effectual to accomplish the object proposed; but if it releases a party *before* trial, what is the process or mandate that would be issued to

the court below to enforce its judgment at the trial? If none can be named, is not the absence of any such process a strong argument against the jurisdiction of the court? This court does not hear cases simply for the purpose of giving *advice* or expressing opinions.

It may be suggested that upon sentencing a prisoner after the judgment a question may arise as to the construction of the powers of the court in that respect. This may depend upon the construction of a statute, as, for example, whether the court has power to sentence to a term of one year upon each count of an indictment, making four years if there are so many counts, or only one year in all. This question of construction is submitted to the court, and it must pass thereon. Now, it may be asked, why can the decision of *this* question be reviewed and not the question of the construction or the constitutionality of the act upon which the indictment and the judgment are based?

The answer is simply this: Because in the first case the statute gives to this court the power to issue the writ for the purpose of inquiring into the "*cause of restraint of liberty*," while the power is denied to question any decision which goes to make up the judgment. The court will look at the judgment simply to ascertain whether it is a sufficient "cause" for the *restraint of liberty*, but will not undertake to impeach the judgment itself for any reason whatever. The judgment of the court to which the question has been submitted is just as conclusive upon the constitutionality of the act upon which the charge is based as upon any other judicial question.

It may be regarded as a question of abstract right and propriety that the judgment of the court as to ques-

tions properly arising at the trial should be reviewed by this court as well as to matters relating purely to the question of restraint of liberty, but it is sufficient for us to reply such is not the will of the legislative power.

Whether this is a sufficient reason or not for the distinction I have endeavored to make, still the fact remains that this court has acted upon such a distinction, and has not in a single instance transcended the rule I have expressed, and has never undertaken upon an inquiry as to the cause of commitment simply, to pass upon the construction or constitutionality of an act upon which a criminal charge is based, or upon any other question properly cognizable at the trial of the cause.

By the act of March 3, 1879 (20 Stat. L., p. 354), writ of error may now issue from the circuit court of the United States to correct any error of the district court. The petitioner alleges that he is held under process issuing from the district court. He has a full and complete remedy for any possible wrong that may be done to him by application in the proper form to the circuit court. There can certainly be no necessity for him to come to this court in the first instance; and can he do it, passing by the circuit court? I suggest this inquiry for the consideration of the court.

As to the propriety and constitutionality of the proceedings complained of, I beg leave to refer to a brief filed by me in the case of Virginia *vs.* Rives, original No. 1, now pending in this court.

W. WILLOUGHBY,
On behalf of United States.

1879
10-371

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No. 7. Orig

Supreme Court of the United States.

No. 7—ORIGINAL—OCTOBER TERM, 1879.

EX-PARTE: IN THE MATTER OF ALBERT SIEBOLD ET AL., Petitioners. } Petition for Habeas Corpus and Certiorari.

To the Honorable the Supreme Court of the United States:

The petition of Albert Siebold, Walter Tucker, Martin C. Burns, Lewis Coleman, and Henry Bowers, all citizens of the State of Maryland, respectfully shows to this honorable court, that they are deprived of their liberty by John M. McClintock, esq., marshal of the United States for the District of Maryland, and James H. Irvin, esq., warden of the jail of the city of Baltimore, and that they are thus held in custody, by the said marshal and warden, by color of the authority of the United States, contrary to the Constitution and laws of the United States.

Your petitioners show that on the 5th day of November, 1878, an election was held in the State of Maryland, at which representatives in Congress of the United States were voted for, and that the time, place, and manner of holding such election had been prescribed in Maryland by the legislature thereof, which had enacted such laws as in their judgment were fit and proper to regulate the manner of holding such election.

That your petitioners were judges of said election, duly appointed under said state laws, and deriving all their powers and functions from such state laws.

That they discharged their duty, under such state laws, at said state election, according to the best of their judgment and ability.

That they were indicted and convicted at the November term, 1878, of the Circuit Court of the United States on indictments; the indictment against Siebold charging that he, being a judge appointed under state laws, did an act unauthorized by such state laws, or by laws of the United States, upon which he was convicted and sentenced to eighteen months imprisonment in the jail of the city of Baltimore.

That against Bowers charged, that being a state judge of election, he hindered and obstructed a United States supervisor of election in the discharge of his duty.

Burns was convicted, that being a state judge of election, of hindering a supervisor of elections in the discharge of his duty, and then of resisting a special deputy marshal and the mashal in their arrest of him for his offence against the supervisor.

Tucker was convicted, that being a state judge of election, of hindering a special deputy marshal in his free attendance at the polls.

And Coleman was convicted, that being a state judge of election, he hindered a marshal in his free attendance at the polls, and in supporting and protecting a supervisor of elections in the discharge of his duty, and also that, being such state judge of elections, he did an act unauthorized by the laws of Maryland, or of the United States, with intent to affect the result of said election.

And on these convictions your petitioners Bowers, Burns, Tucker, and Coleman, were each sentenced by said court to twelve months confinement in the jail of the city of Baltimore. By virtue of which said several judgments the said marshal and warden now hold your petitioners. Your petitioners aver and charge that the act of Congress under which these pretended convictions have taken place,

are unconstitutional and void, and confer no jurisdiction on the said circuit court over your petitioners, on the subject-matter with which the said court attempted to deal; and that said court was wholly without jurisdiction in the premises, and that therefore all its proceedings therein are null and void.

Wherefore these petitioners pray that this honorable court do forthwith order the writ of habeas corpus to issue from this court to the said John M. McClintock and James H. Irvin, esqrs., marshal and warden as aforesaid, requiring them to produce the bodies of your petitioners before this court at some time to be designated in said writ, there to abide what shall be awarded by this court in the premises. And at the same time they pray that this court will direct the writ of certiorari to issue from this court to the said Circuit Court of the United States for the District of Maryland, ordering and requiring said circuit court forthwith to certify to this court true copies of the proceedings, indictments, trials, verdicts, judgments, and sentences which have been had, found, tried, and passed by said circuit court in the premises against your petitioners, and under which they are now deprived of their liberty, by judgment of said circuit court. And as in duty bound your petitioners will ever pray, &c.

ALBERT SEIBOLD.
WALTER TUCKER.
MARTIN C. BURNS.
LOUIS COLEMAN.
HENRY BOWERS.

BRADLEY T. JOHNSON,
JOHN P. POE,
BERNARD CARTER,
C. I. M. GWINN, Atty. Genl. of Maryland,
(who appears by direction of the Governor of Maryland,)
of Counsel.

MARYLAND, *sct.*

On the 18th day of October, 1879, before me, a commissioner of the United States Circuit Court for the District of Maryland, personally appeared Albert Seibold, Walter Tucker, Martin C. Burns, Lewis Coleman, and Henry Bowers, the above-named petitioners, and made oath, in due form of law, that the facts set forth in the above petition are true, at the same time subscribing their signatures thereunto.

In testimony whereof, witness my hand and seal, the day and date last above mentioned.

ISAAC BROOKS, JR.,
United States Commissioner
with the District of Maryland.

Endorsed: Sup. Court U. S., 1879, October term. No. 7, original. Ex-parte: In the matter of Albert Seibold et al., petitioners. Petition for habeas corpus and certiorari. Filed 20th October, 1879.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1879.

No 7 orgl

Ex parte SIEBOLD, TUCKER, BURNS, COLEMAN AND BOWERS.

PETITION FOR HABEAS CORPUS, ORDER NISI AND RECORD.

Note of Argument in behalf of the Petitioners,

BY BRADLEY T. JOHNSON,
JOHN P. POE,
BERNARD CARTER,
THEIR COUNSEL.

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SIEBOLD,

TUCKER, BURNS,

COLEMAN & BOWERS

Petition for Habeas Corpus.

SUPREME COURT

UNITED STATES.

OCTOBER TERM, 1879.

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To the Honorable MORISON R. WAITE, Chief Justice of the Supreme Court of the United States, and allotted to the Fourth Circuit, in which is comprised the District of Maryland.

The petition of Albert Siebold, a citizen of the State of Maryland, respectfully represents to your Honor, that he is deprived of his liberty by John M. McClintock, Esq., Marshal of the United States for the District of Maryland, and James H. Irvin, Warden of the Jail of the City of Baltimore, and that he is thus held in custody by color of the authority of the United States, contrary to the Constitution and Laws of the United States.

Your petitioner shows that on the 5th day of November, 1878, an election was held in the State of Maryland for members of Congress of the United States, and that the time, place and manner of holding such election had been prescribed by the Legislature of the State of Maryland, which had enacted such laws as, in their judgment, were fit and proper to carry on such election.

That your petitioner was one of the Judges of said election, duly appointed under said State laws, and deriving all his powers and functions from such State laws ;

That he discharged his duty as such State officer, under said State laws at said State election, to the best of his judgment, knowledge and ability ;

That he was indicted and convicted at the November Term, 1878, of the Circuit Court of the United States for the District of Maryland, on an indictment charging him, under the name of Albert Siebold, alias Albert Kloman, that being a Judge of the election for members of Congress, as aforesaid, under State laws, on the 5th of November, 1878, did an act unauthorized by the laws of the State of Maryland, or of the United States, contrary to section 5515 of the Revised Statutes of the United States ;

That on said conviction he was sentenced to be imprisoned eighteen months in the Jail of the city of Baltimore, and was, by said Court, committed to the custody of said John McClintock, Esq., Marshal, and James H. Irvin, Esq., Warden, as aforesaid, and by virtue of which judgment said Marshal and Warden now hold him ;

All of which will more fully appear by the copy of the record of the proceeding in said Court, duly certified and herewith exhibited as part of this petition.

Your petitioner avers and charges that the Acts of Congress under which this pretended conviction is alleged to have taken place, are unconstitutional and void, and conferred no jurisdiction on the said Circuit Court, either as to the person of your petitioner or the subject-matter with which said Court attempted to deal.

And he further avers that no law of Congress exists which can confer jurisdiction over your petitioner in the matter whereof he hath been convicted by said Court, to wit: the due discharge of his duty as a State officer, and that, therefore, all the proceedings of said Court are without jurisdiction, null and void.

Wherefore he prays from your Honor the benefit of the writ of Habeas Corpus to the said John M. McClintock, Esq., Marshal as aforesaid, and James H. Irvin, Esq., Warden as aforesaid, directed, ordering them to have the body of your petitioner before your Honor on some day, at some place, to be in said writ designated, together with the true cause of his detention.

JOHNSON & POE,
BERNARD CARTER,
For Petitioner.
CHARLES J. M. GWINN,
Attorney General of Maryland,
by direction of the Governor of Maryland.

ALBERT SIEBOLD.

MARYLAND, SCT.

On this 9th day of September, 1879, before me, a Commissioner of the United States Circuit Court for the District of Maryland, personally appeared Albert Siebold, the above named petitioner, and made oath in due form of law that the facts set forth in the above petition are true, at the same time subscribing his signature thereunto.

GEORGE MORRIS BOND,
United States Commissioner for the District of Maryland.

To the Honorable MORISON R. WAITE, Chief Justice of the Supreme Court of the United States, and allotted to the Fourth Circuit, in which is comprised the District of Maryland.

The petition of Walter Tucker, a citizen of Maryland, respectfully represents to your Honor, that he is deprived of his liberty by John M. McClintock, Esq., Marshal of the United States for the District of Maryland, and James H.

Irvin, Esq., Warden of the Jail of the city of Baltimore, and is thus held in custody by them by color of the authority of the United States, contrary to the Constitution and Laws of the United States.

Your petitioner shows that on the 5th day of November, 1878, an election was held in the State of Maryland for members of the Congress of the United States, and that the time, place and manner of holding such election had been prescribed by the Legislature of the State of Maryland, which had enacted such laws as, in their judgment, were fit and proper to carry on such election.

That your petitioner was one of the Judges of said election, duly appointed under said State laws, and deriving all his powers and functions from such State laws.

That he discharged his duty as such State officer, under said State laws, at said State election.

That he was indicted and convicted at the November Term, 1878, of the Circuit Court of the United States for the District of Maryland, on an indictment, charging that he, being a Judge of election, under State laws, at the said election of November 5th, 1878, at which a member of Congress was voted for, did, by the exercise of his power and authority as such State Judge, hinder and prevent a certain United States Deputy Marshal and a certain so-called United States Supervisor of Elections from discharging duties of inspecting, superintending and supervising the said election for member of Congress; which said Deputy Marshal and so-called Supervisor were appointed under sections 2012, 2021, 2022 of the Revised Statutes of the United States.

Your petitioner was also charged in and convicted under the same indictment, that he, being a Judge of election, appointed under the laws of Maryland, did an act unauthorized by any law of Maryland or of the United States, contrary to sections 5514, 5515 and 5522 of the said Revised Statutes.

her shows, that on said conviction, he was sen-

imprisoned for twelve months in the jail of the

city of Baltimore, and was, by said Court, committed to the custody of the said John M. McClintock, Esq., Marshal, as aforesaid, and James H. Irvin, Esq., Warden as aforesaid, and by virtue of which judgment said Marshal and Warden now hold him, and unconstitutionally deprives him of his liberty; all of which will more fully appear by a certified copy of the proceedings before said Court, herewith filed as part of this petition.

Your petitioner avers and charges that the Acts of Congress under which this pretended conviction is alleged to have taken place, are unconstitutional, and conferred no jurisdiction on the said Circuit Court, either as to the person of your petitioner or the subject-matter with which said Court attempted to deal.

And he further avers that all of the proceedings of said Court, under, and by color of which, he is held in custody, are without jurisdiction and void.

Wherefore he prays your Honor to grant him the benefit of the writ of Habeas Corpus to the said John M. McClintock, Esq., Marshal as aforesaid, and James H. Irvin, Esq., Warden as aforesaid, directed, ordering them to have the body of your petitioner before your Honor at some time and place to be in said writ designated, together with the true cause of his detention.

And as in duty bound he will ever pray, &c.

JOHNSON & POE,
BERNARD CARTER,
Att'ys for Petitioner.
CHARLES J. M. GWINN,
Attorney General of Maryland,
by direction of the Governor.

WALTER TUCKER.

On this 9th day of September, 1879, before me, a Commissioner of the United States Circuit Court for the District

of Maryland, personally appeared Walter Tucker, the above petitioner, and made oath in due form of law that the facts set forth in the above complaint are true, and at the same time subscribed his name thereunto.

Sworn before me at the city of Baltimore and State of Maryland this ninth day of September, in the year eighteen hundred and seventy-nine.

GEORGE MORRIS BOND,
United States Commissioner for the District of Maryland.

NOTE.—The petitions of Burns, Bowers and Coleman are identical with that of Tucker, except name of petitioner.

ORDER OF THE CHIEF JUSTICE.

Lyme, Connecticut.

The petition of Henry Bowers, Martin C. Burns, Walter Tucker, Lewis Coleman and Albert Siebold, that the benefit of the writ of Habeas Corpus be extended to them and issued to John M. McClintock, Marshal of the United States for the District of Maryland, and James H. Irvin, Warden of the Jail of the city of Baltimore, directing them to have the bodies of the said petitioners before me, together with the true cause of their detention, at some time and place to be therein designated, having been read and considered, it is this 10th day of September, 1879, ordered by me, Morison R. Waite, Chief Justice of the Supreme Court of the United States, allotted to the Fourth Circuit, in which is comprised the District of Maryland, that the said John M. McClintock, Marshal as aforesaid, and James H. Irvin, Warden as aforesaid, do show cause before me, on the second Tuesday of October next, in the city of Washington, why the said writs should not issue as prayed in the said petitions.

And it is further ordered that copies of said petitions, and of this order, shall be served on the said Marshal and

Warden at least ten days before the day above appointed for the hearing.

M. R. WAITE,
Chief Justice Supreme Court United States.
September 10th, 1879.

BALTIMORE, September 15th, 1879.

We acknowledge service of within order and petitions of Bowers, Siebold, Burns, Tucker and Coleman, for Habeas Corpus.

JOHN M. MCCLINTOCK,
United States Marshal, Maryland.

JAMES H. IRVIN,
Warden Baltimore City Jail.

INDICTMENT.

UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND,

In the Circuit Court of the United States,
for the Fourth Circuit, in and for the Maryland District.

The Grand Inquest of the United States of America, for the Maryland District, inquiring for the body of that district, do, on their oaths, present, that heretofore, on the fifth day of November, in the year of our Lord eighteen hundred and seventy-eight, at the Fourth Congressional District of the State of Maryland, in the Maryland District aforesaid, a lawful election was held, whereat a Representative for that Congressional District in the Forty-Sixth Congress of the United States was voted for.

And the jurors aforesaid, upon their oath aforesaid, do further present, That a certain John T. Hodges was, then and there, a Supervisor of Election of the United States, duly appointed such by the Circuit Court aforesaid, pursuant to the two thousand and twelfth section of the Revised

Statutes of the United States, for the third voting precinct of the Fifteenth Ward of the city of Baltimore in the said Congressional District, for and in respect of the election aforesaid, thereat.

And the jurors aforesaid, upon their oath aforesaid, do further present, That a certain Charles A. Lusby was, then and there, a Special Deputy Marshal of the United States, duly appointed such by the United States' Marshal for the Maryland District, pursuant to the two thousand and twenty-first section of said Revised Statutes, and assigned for such duty as is provided by that section and the thereto next following section of said Revised Statutes, to the said third voting precinct of said Fifteenth Ward of the said city of Baltimore, at the Congressional election aforesaid, thereat.

And the jurors aforesaid, upon their oath aforesaid, do further present, That Albert Siebold, late of the said district, yeoman, otherwise called Albert Kloman, on the said fifth day of November, in the year aforesaid, at the Maryland District aforesaid, to wit: At the said precinct of said ward of the said city, in the District and Congressional District aforesaid, (being then and there a judge of said election in and for the said precinct, created such under the authority of the State of Maryland), unlawfully did obstruct, hinder, and by threats, intimidation, and menace of arrest, interfere with the said Charles A. Lusby, who was then and there such Deputy Marshal as aforesaid, in the performance of a certain duty required of him, and which he was then and there authorized to perform by section twenty hundred and twenty-two, before mentioned of said Statutes, to wit: the duty of supporting and protecting the said Supervisor of Election at the polls of said precinct, during said election thereat, in the discharge of the duties of him, (the said Supervisor), and preventing fraudulent voting at the said polls of said election, contrary to section fifty-five hundred and twenty-two of said Statutes and against the peace, government and dignity of the United States.

COUNT SECOND.

And the jurors aforesaid, upon their oath aforesaid, do further present, That the said Albert Seibold, otherwise called Albert Kloman, on the day and year aforesaid, at the voting precinct and city aforesaid, within the district aforesaid, (he being then and there such judge of election of the said precinct as aforesaid), at the said election unlawfully did, as such judge as aforesaid, knowingly refuse to receive the vote of a certain person, whose name is to said jurors unknown, then and there entitled to vote, to wit: at the same election, and in the same election precinct, contrary to section fifty-five hundred and eleven of the said Statutes, and against the peace, government and dignity of the United States.

COUNT THIRD

And the jurors aforesaid, upon their oath aforesaid, do further present, That the said Albert Siebold, otherwise called Albert Kloman, afterwards, to wit: on the day and year aforesaid, at the precinct aforesaid, of the city aforesaid, within the district aforesaid, unlawfully and knowingly, at the election aforesaid, (he being then and there such judge of said election for the said voting precinct as aforesaid), did refuse to receive the vote of one Robert R. Ross, who was then and there entitled to vote at said election in the said precinct, contrary to the section last aforesaid of said Statutes, and against the peace, government and dignity of the United States.

COUNT FOURTH

And the jurors aforesaid, upon their oath aforesaid, do further present, That the said Albert Siebold, otherwise called Albert Kloman, on the day and year aforesaid, at the precinct aforesaid, within the district aforesaid, unlawfully and knowingly, at the election aforesaid, in the precinct

aforesaid, (he being then and there such judge of said election for that precinct as aforesaid), did refuse to receive the vote of one Asa Rue, who was then and there entitled to vote at the same election in the same precinct, contrary to the section last aforesaid of said Statutes, and against the peace, government and dignity of the United States.

COUNT FIFTH.

And the jurors aforesaid, upon their oath aforesaid, do further present, That the said Albert Siebold, otherwise called Albert Kloman, on the day and year aforesaid, at the precinct aforesaid, within the district aforesaid, (he being then and there such judge of said election as aforesaid), did violate a certain duty on him as such judge as aforesaid, imposed by the law of the State of Maryland; that is to say, by the twentieth section of the Act of Assembly of that State, entitled an Act to provide for the revision of the lists of registered voters in this State, approved April 7th, 1876, A. D., which requires that the judges of election of said State shall not receive or deposit in the ballot-box the ballot of any person offering to vote until they have found his name in the list of qualified voters; by then and there knowingly receiving and depositing in the ballot-box of said precinct the vote of a certain person, (whose name is to said jurors as yet unknown), at the said election in said precinct, before the name of the same person had been found, to wit: by the judges of said election of said precinct in the list of the qualified voters thereof; whereas, in truth, and in fact, the name of the same person was not then and there on the list of the qualified voters of said precinct, contrary to section fifty-five hundred and fifteen of said Statutes, and against the peace, government and dignity of the United States

COUNT SIXTH.

And the jurors aforesaid, upon their oath aforesaid, do further present, That the said Albert *Sieman*, otherwise

called Albert Kloman, on the day and year aforesaid, at the precinct aforesaid, within the district aforesaid, (he being then and there such judge of the same precinct as aforesaid), unlawfully at the said election, by threat and intimidation, did prevent a certain qualified voter of the same precinct, whose name is to said jurors as yet unknown, from freely exercising the right of suffrage, to wit: at said election in the said precinct, contrary to section fifty-five hundred and eleven of said Revised Statutes, and against the peace, government and dignity of the United States.

COUNT SEVENTH.

And the jurors aforesaid, upon their oath aforesaid, do further present, That the said Albert Siebold, otherwise called Albert Kloman, afterwards, to wit: on the day and year first aforesaid, at the precinct and district aforesaid, (he being then and there such officer of the State election as aforesaid), unlawfully did, as such judge of the election aforesaid, (as herein aforesaid), for said voting precinct, violate a duty on him imposed by the said twentieth section of the Act of Assembly of the State of Maryland, by, then and there, and thereat wrongfully and corruptly, and contrary to said Act of Assembly, refusing and denying duly to ascertain whether the name of a certain person, (whose name is to the jurors as yet unknown), who duly offered to vote at said election in said precinct, and in that behalf tendered his ballot to the said judge thereof, was then and there to be found in the list of the qualified voters thereof; but to the contrary thereof, causing and inducing, by and through threats, intimidation, artifice and deceit, the said person, offering to vote as aforesaid, to leave and depart the poll of election of said precinct, without having voted thereat, and without it having been ascertained by the said judge of election, (to whom the said ballot was tendered as aforesaid), whether or not the name of the identical person who then and there offered to vote as aforesaid, was to be found in list of qualified voters of the said precinct, contrary

to the said fifty-five hundred and fifteenth section of said Statutes, and against the peace, government and dignity of the United States.

COUNT EIGHTH.

And the jurors aforesaid, upon their oath aforesaid, do further present, That the said Albert Seibold, otherwise called Albert Kloman, afterwards, to wit: on the day and year aforesaid, at the precinct aforesaid, within the district aforesaid, (he being then and there such officer and judge of said election as aforesaid), knowingly did an act at the said election unauthorized by any law of the State of Maryland, and unauthorized by any law of the United States, by, then and there, and thereat, at the said election, clandestinely and fraudulently putting and placing in the ballot-box of the said voting precinct certain ballots, (within the intent and meaning of the fifty-five hundred and fourteenth section of said Statutes of the United States), to the number of four and more, after the voting at the said precinct at and for said election had begun, and before the ballots voted at the same election in that precinct, and lawfully deposited in the same ballot-box, had been counted, with intent to affect the same election, and the result thereof, contrary to section fifty-five hundred and fifteen of the Revised Statutes of the United States, and against the peace, government and dignity of the United States.

ARCHIBALD STIRLING, JR.,
Attorney of the United States for the Maryland District.

Whereupon the said Grand Inquest having retired from the bar of the Court here to inquire of and concerning the said indictment, it afterwards returned the said indictment to the Court thereon indorsed, to wit:

[A true bill.] W. B. BROOKS, *Foreman.*

And the said Albert Siebold, alias Albert Kloman, having heard the said indictment read, saith that he is not guilty thereof, and hereupon puts himself upon the country, and Archibald Sterling, Jr., Esq., District Attorney afore-

said, who, for the said United States in this behalf prosecuteth, doth the like.

Whereupon the panel of petit jurors, returned to the Court here by the Marshal of the district aforesaid, according to the Statutes in such case made and provided, being called, come, whereupon certain of them, to wit: Philip S. Cross, Charles W. Beatty, William Galloway, James A. Lewis, W. C. Dickinson, Arthur Stabler, William Brown, Benj. Chesney, S. C. Gorrell, Jacob Campbell, Frisby J. Davis, and Jas. Z. Browning are sworn to say the truth in the premises, and the said jurors so being empannelled and sworn to say the truth in the premises, upon their oath and affirmation do say, that the said Albert Siebold, alias Albert Kloman, *is guilty of the premises aforesaid in the eighth count in the indictment aforesaid, above specified and laid to his charge*, in manner and form as by the said indictment is above charged upon him, and not guilty of the premises aforesaid in the first, second, third, fourth, fifth, sixth and seventh counts in the said indictment, above specified and laid to his charge in manner and form aforesaid.

Thereupon it is considered by the Court here that the said Albert Siebold, alias Albert Kloman, do pay a fine to the said United States of five dollars, and the cost accrued upon the prosecution aforesaid. It is also considered by the Court here that the said Albert Siebold, alias Albert Kloman, be imprisoned in the Jail in Baltimore city for and during the term of eighteen months; and the said Albert Siebold, alias Albert Kloman, is now committed by the Court here to the custody of the Marshal of the district aforesaid, by him to be taken and delivered into the custody of the Warden of the Jail of Baltimore city, there to be kept in safe custody, &c.

MEMORANDUM.

Verdict was rendered in this case on the 27th February, 1879; and judgment was rendered on the 28th February, 1879.

INDICTMENT.

UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND,

In the Circuit Court of the United States,
for the Fourth Circuit, in and for the Maryland District.

The Grand Inquest of the United States of America, for the Maryland District, inquiring for the body of that district, do, on their oaths, present, that heretofore, on the fifth day of November, in the year of our Lord eighteen hundred and seventy-eight, at the Fourth Congressional District of the State of Maryland, in the Maryland District aforesaid, a lawful election was held, whereat a Representative for that Congressional District in the Forty-Sixth Congress of the United States was voted for.

And the jurors aforesaid, upon their oath aforesaid, do further present, That a certain Frederick S. Hammond was, then and there, a Supervisor of Election of the United States, duly appointed such by the Circuit Court aforesaid, pursuant to the two thousand and twelfth section of the Revised Statutes of the United States, for the first voting precinct of the Fourteenth Ward of the city of Baltimore in the said Congressional District, for and in respect of the election aforesaid, thereat.

And the jurors aforesaid, upon their oath aforesaid, do further present, That a certain James N. Schofield was, then and there, a Special Deputy Marshal of the United States, duly appointed such by the United States' Marshal for the Maryland District, pursuant to the two thousand and twenty-first section of said Revised Statutes, and assigned for such duty as is provided by that section and the thereto next following section of said Revised Statutes, to the said first voting precinct of said ward of the said city of Baltimore, at the Congressional election aforesaid, thereat.

And the jurors aforesaid, upon their oath aforesaid, do further present, That Justus J. Gude, late of said district, yoeman, and Walter Tucker, late of said district, yeoman, on the said fifth day of November, in the year aforesaid, at the Congressional District aforesaid, in the Maryland District aforesaid, to wit: at the said voting precinct of said ward of said city, (they being then and there judges of the said election at and for the same voting precinct, created such under the authority of the State of Maryland), unlawfully did obstruct, hinder, and by use of their authority as such judges as aforesaid, interfere with and prevent the said Supervisor of Election in the performance of a certain duty required of him, and which he was then and there, by the law of the United States in such case made and provided, authorized to perform, to wit: that of challenging the votes offered at said election at the polls of election of said precinct, (by persons whose legal qualifications so to vote the said Supervisor of Election then and there doubted), contrary to section fifty-five hundred and twenty-two of said Statutes, and against the peace, government and dignity of the United States.

COUNT SECOND.

And the jurors aforesaid, upon their oath aforesaid, do further present, That the said Justus J. Gude and the said Walter Tucker afterwards, to wit: on the day and year aforesaid, at the said voting precinct of said ward of said city, unlawfully and by exercise of their power and authority as such judges as aforesaid, did prevent and hinder the free attendance and presence of the said James N. Schofield, (who was then and there such Deputy Marshal as aforesaid, in the due execution of his said office), at the poll of said election of and for the said voting precinct, and the full and free access of the same Deputy Marshal to the same poll of election, contrary to the said last mentioned section of said Statutes, and

against the peace, government and dignity of the United States.

COUNT THIRD.

And the jurors aforesaid, upon their oath aforesaid, do further present, That the said Justus J. *Goode* and the said Walter Tucker, on the day and year aforesaid, at the voting precinct aforesaid, in the district aforesaid, within the jurisdiction of this Court, at the Congressional election aforesaid, did, by threats and intimidation, unlawfully induce divers qualified voters of the said voting precinct of African race and descent, to the number of ten and more, whose names are to the jurors aforesaid as yet unknown, to refuse to exercise the right of suffrage, to wit: at the said poll of election of said voting precinct, contrary to section fifty-five hundred and eleven of said Statutes, and against the peace, government and dignity of the United States.

COUNT FOURTH.

And the jurors aforesaid, upon their oath aforesaid, do further present, That the said Justus J. *Goode* and the said Walter Tucker, on the day and year aforesaid, at the precinct aforesaid, in the district aforesaid, did, by threat and intimidation, at the election aforesaid, prevent certain, to wit: ten and more qualified voters of said precinct, of African race, (whose names are to the said jurors as yet unknown), from freely exercising the right of suffrage, to wit: at the said poll of election of the same precinct, contrary to the section last aforesaid, and against the peace, government and dignity of the United States.

COUNT FIFTH.

And the jurors aforesaid, upon their oath aforesaid, do further present, That the said Justus J. Goode *and the said*

Walter Tucker, on the day and year aforesaid, at the precinct aforesaid, within the district aforesaid, (they being then and there such officers of said election as aforesaid), knowingly and unlawfully at the said election did a certain act, not then and there authorized by any law of the State of Maryland, and not authorized then and there by any law of the United States, by then and there fraudulently and clandestinely putting and placing in the ballot box of the said precinct twenty (and more) ballots, (within the intent and meaning of section fifty-five hundred and fourteen of said Statutes), which had not been voted at said election in said precinct before the ballots, then and there lawfully deposited in the same ballot-box, had been counted, with intent thereof to affect said election and the result thereby, contrary to section fifty-five hundred and fifteen of said Statutes, and against the peace, government and dignity of the United States.

ARCHIBALD STERLING, JR.,
Attorney of the United States for the Maryland District.

Whereupon the said Grand Inquest having retired from the bar of the Court here, to inquire of and concerning the said indictment, afterwards return the said indictment to the Court here, thereon endorsed, to wit:

A true bill. W. B. BROOKS, *Foreman.*

And the said Justus J. Gude and Walter Tucker having heard the said indictment read, say that they are not guilty thereof, and hereupon put themselves upon the country, and Archibald Sterling, Jr., Esq., District Attorney aforesaid, who for the said United States in this behalf prosecuteth, doth the like.

Whereupon the panel of petit jurors returned to the Court here by the Marshal of the district aforesaid, according to the Statutes in such case made and provided, being

called, come, whereupon certain of them, to wit: W. W. Sullivan, Philip S. Cross, Charles W. Beatty, William Galloway, N. C. Dickerson, Joseph H. Kelly, J. Z. Browning, Frisby J. Davis, Jacob Campbell, Charles B. Fox, Skipwith C. Gorrell, Benjamin Chesney, are sworn to say the truth in the premises, and the said jurors so being empanneled and sworn to say the truth in the premises, upon their oath do say, that the said Justus J. Gude and Walter Tucker are *guilty of the premises aforesaid in the second and fifth counts* in the indictment aforesaid, above specified and laid to their charge, in manner and form as by the said indictment, is above charged upon them, and not guilty of the premises aforesaid in the first, third and fourth counts in the said indictment, above specified and laid to their charge in manner and form aforesaid.

Thereupon it is considered by the Court here that the said Justus J. Gude and Walter Tucker do each of them pay a fine to the said United States of five dollars, and the costs accrued upon the prosecution aforesaid.

It is also considered by the Court here that the said Justus J. Gude and Walter Tucker be imprisoned in the jail in Baltimore city for and during the term of twelve months, from January 27th, 1879, and the said Justus J. Gude and Walter Tucker are now committed by the Court here to the custody of the Marshal of the district aforesaid, by him to be taken and delivered into the custody of the Warden of the Jail of Baltimore city, there to be kept in safe custody, &c.

MEMORANDUM.

Verdict was rendered in this case on the 27th day of January, 1879.

Judgment was rendered on the 15th February, 1879.

[Test :] JAS. W. CHEW, *Clerk.*

INDICTMENT.

UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND,

In the Circuit Court of the United States,
for the Fourth Circuit, in and for the Maryland District.

The Grand Inquest of the United States of America, for the Maryland District, inquiring for the body of that district, do, on their oaths, present, that heretofore, on the fifth day of November, in the year of our Lord eighteen hundred and seventy-eight, at the Fifth Congressional District of the State of Maryland, in the Maryland District aforesaid, a lawful election was held, whereat a Representative for that Congressional District in the Forty-Sixth Congress of the United States was voted for.

And the jurors aforesaid, upon their oath aforesaid, do further present, That a certain James McKenny was, then and there, a Supervisor of Election of the United States, duly appointed such by the Circuit Court aforesaid, pursuant to the two thousand and twelfth section of the Revised Statutes of the United States, for the fifth voting precinct of the Seventeenth Ward of the city of Baltimore in the said Congressional District, for and in respect of the election aforesaid, thereat.

And the jurors aforesaid, upon their oath aforesaid, do further present, That a certain David Duncan was, then and there, a Special Deputy Marshal of the United States, duly appointed such by the United States' Marshal for the Maryland District, pursuant to the two thousand and twenty-first section of said Revised Statutes, and assigned for such duty as is provided by that section and the thereto next following section of said Revised Statutes, to the said fifth voting precinct of said ward of the said city of Baltimore, at the Congressional election aforesaid, thereat; and that John M. McClintock was then and there United States Marshal for the District of Maryland.

And the jurors aforesaid, upon their oath aforesaid, do further present, That Martin C. Burns, late of the said district yoeman, on the said fifth day of November, in the year aforesaid, at the Maryland District aforesaid, to wit: at said precinct of said ward, within the Congressional District aforesaid, (he being then *and there a judge of said election* for the said voting precinct, *created such under the authority of the State of Maryland*), unlawfully at the said election did obstruct, hinder, and by use of his power and authority as such judge as aforesaid, interfere with the said James McKenny, (who was then and there such Supervisor of Election as aforesaid in the due execution of that office), in the performance of certain duty of him required, and which he was then and there authorized by the two thousand and seventeenth section of said Statutes to perform, that is to say, the duty of personally inspecting and scrutinizing, on the day of said election, the manner in which the voting was done at the polls of said election for said precinct, by refusing and denying to allow the said Supervisor of Election to inspect the ballot-box of said poll of election before any vote voted thereat had been deposited in the same box, contrary to section fifty-five hundred and twenty-two of said Statutes, and against the peace, government and dignity of the United States.

COUNT SECOND.

And the jurors aforesaid, upon their oath aforesaid, do further present, That the said Martin C. Burns, afterwards, to wit: on the day and year aforesaid, at the precinct aforesaid, unlawfully, at the said election, did hinder and prevent the free attendance and presence of the said James McKenny, (who was then and there such Supervisor of Election as aforesaid, in the due execution of that office), at the said poll of said election, to wit: at and within the room where the same poll of election was then and there had and held, by then and there refusing and denying to admit him into

the same room, and forcibly keeping him out of the same, contrary to the said fifty-five hundred and twenty-second section, and against the peace, government and dignity of the United States.

COUNT THIRD.

And the jurors aforesaid, upon their oath aforesaid, do further present, That the said Martin C. Burns, afterwards, to wit: on the day and year aforesaid, at the precinct aforesaid, unlawfully, at the election aforesaid, did obstruct, hinder, assault, and by force and violence interfere with the said David Duncan, (who was then and there such Special Deputy Marshal as aforesaid, in the due execution of that office), in the performance of the duty of him required, and which he was then and there, by the said twenty hundred and twenty-second section, authorized to perform, that is to say, the duty of then and there, at the said election, arresting and taking into custody, and before the chief Supervisor of Elections for the said district, the said Martin C. Burns, for committing the offences upon him respectively imposed in the first and second counts of this indictment, contrary to the said fifty-five hundred and twenty-second, and against the peace, government and dignity of the United States.

COUNT FOURTH.

And the jurors aforesaid, upon their oaths aforesaid, do further present the said Martin C. Burns, afterwards, to wit: on the day and year aforesaid, at the precinct aforesaid, unlawfully, at the said election, did obstruct and hinder the said John McClintock, (who was then and there such Marshal of the United States as aforesaid, in the due execution of that office), in the performance of the duty (which he was then and there authorized to perform by the Statutes of the United States, in such case made and provided), of assisting and taking into custody the said Martin C. Burns, for committing the offences on him imposed in the afore-

going counts of this indictment, contrary to the Statute of the United States, in such case made and provided, to wit: to section fifty-five hundred and twenty-two of said Revised Statutes, and against the peace, government and dignity of the United States.

ARCHIBALD STERLING, JR.,
Attorney of the United States for the Maryland District.

Whereupon the said Grand Inquest having retired from the bar of the Court here, to enquire of and concerning the said indictment, afterwards returned the said indictment to the Court here thereon endorsed, to wit:

[A true bill.] W. B. BROOKS, *Foreman.*

And the said Martin C. Burns having heard the said indictment read, saith that he cannot deny, but that he is guilty of the misdemeanor aforesaid in the indictment aforesaid, above laid to his charge, in manner and form as by the said indictment, is above against him alleged, and puts himself upon the mercy of the Court here.

Therefore, it is considered by the Court here that the said Martin C. Burns do pay a fine to the said United States of five dollars, and the costs accrued upon the prosecution aforesaid. It is also considered by the Court here that the said Martin C. Burns be imprisoned in the jail in Baltimore city for and during the term of twelve months; and the said Martin C. Burns is now committed by the Court here to the custody of the Marshal of the district aforesaid, by him to be taken and delivered into the custody of the Warden of the Jail of Baltimore city, there to be kept in safe custody, &c.

MEMORANDUM.

Plea of guilty, and judgment of the Court was rendered on the 24th February, 1879.

INDICTMENT.

UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND,

In the Circuit Court of the United States,
for the Fourth Circuit, in and for the Maryland District.

The Grand Inquest of the United States of America, for the Maryland District, inquiring for the body of that district, do, on their oaths, present, that heretofore, on the fifth day of November, in the year of our Lord eighteen hundred and seventy-eight, at the Third Congressional District of the State of Maryland, in the Maryland District aforesaid, a lawful election was held, whereat a Representative for that Congressional District in the Forty-Sixth Congress of the United States was voted for.

And the jurors aforesaid, upon their oath aforesaid, do further present, That a certain Joseph H. Kemp was, then and there, a Supervisor of Election of the United States, duly appointed such by the Circuit Court aforesaid, pursuant to the two thousand and twelfth section of the Revised Statutes of the United States, for the first voting precinct of the Third Ward of the city of Baltimore in the said Congressional District, for and in respect of the election aforesaid, thereat.

And the jurors aforesaid, upon their oath aforesaid, do further present, That a certain Joseph H. Rutter was, then and there, a Special Deputy Marshal of the United States, duly appointed such by the United States' Marshal for the Maryland District, pursuant to the two thousand and twenty-first section of said Revised Statutes, and assigned for such duty as is provided by that section and the thereto next following section of said Revised Statutes, to the said fifth voting precinct of said ward of the said city of Baltimore, at the Congressional election aforesaid, thereat.

And the jurors aforesaid, upon their oath aforesaid, do further present, That Lewis Coleman, late of the said district, yeoman, on the said fifth day of November, in the year aforesaid, at the Maryland District aforesaid, to wit: at the said voting precinct of said ward, within the District and Congressional District aforesaid, (*he being then and there a judge of said election, created such under the authority of the State of Maryland, at and for the said precinct*), *unlawfully, and by use of his power and authority as such judge of election as aforesaid*, did hinder and prevent the presence and free attendance of the said Joseph H. Rutter, (who was, then and there, such Special Deputy Marshal as aforesaid, in the due execution of his said office), at the poll of the said election, at and for the said voting precinct, contrary to the fifty-five hundred and twenty-second section of said Statutes, and against the peace, government and dignity of the United States.

COUNT SECOND.

And the jurors aforesaid, upon their oath aforesaid, do further present, That the said Lewis Coleman, afterwards, to wit: on the day and year aforesaid, at the precinct aforesaid of said city, within the district aforesaid, (*he being then and there such judge of election as aforesaid*), *unlawfully did obstruct, hinder, and by the use of his power and authority as such judge as aforesaid*, interfere with the said Special Deputy Marshal of the United States in the performance of a certain duty of him, and which he was then and there authorized to perform by the Statute of the United States, in such case made and provided, to wit: by section twenty hundred and twenty-two of said Statutes, that is to say, the duty of supporting and protecting the said Supervisor of Election in the discharge of the duties of him (the said Supervisor of Election) at the poll of said election in and for the said voting precinct, by then and there ordering, directing, and requiring the said Deputy Marshal to leave and

depart the room in which the said poll of election then and there was, and was being held for a long space of time, to wit: for one hour and more, contrary to the fifty-five hundred and twenty-second section of said Statutes, and against the peace, government and dignity of the United States.

COUNT THIRD.

And the jurors aforesaid, upon their oath aforesaid, do further present, That the said Lewis Coleman, afterwards, to wit: on the day and year aforesaid, at the said precinct of said ward within the district aforesaid, (*he being, then and there, such officer of the said election as aforesaid*), knowingly and unlawfully *did a certain act, not then and there authorized by any law of the State of Maryland*, and not then and there authorized by any law of the United States, by then and there fraudulently and clandestinely putting and placing in the ballot-box of the said voting precinct twenty (and more) ballots, within the intent and meaning of section fifty-five hundred and fourteen of said Statutes, before the ballots voted at said election in said precinct, and lawfully deposited in the said ballot-box, had been counted, and after the voting of certain of the same, with intent, then and there, and thereby to effect the said election and the result thereof, contrary to the Statute of the United States, in such case made and provided, to wit: to section fifty-five hundred and fifteen of said Revised Statutes, and against the peace, government and dignity of the United States.

ARCHIBALD STIRLING, JR.,
Attorney of the United States for the Maryland District.

Whereupon the said Grand Inquest having retired from the bar of the Court here to inquire of and concerning the said indictment, afterwards returned the said indictment to the Court here thereon indorsed, to wit:

[A true bill.] W. B. BROOKS, *Foreman.*

And the said Lewis Coleman, having heard the said indictment read, saith that he is not guilty thereof, and hereupon puts himself upon the country, and Archibald Sterling, Jr., Esq., District Attorney aforesaid, who, for the said United States in this behalf prosecuteth, doth the like.

Whereupon the panel of petit jurors, returned to the Court here by the Marshal of the district aforesaid, according to the Statutes in such case made and provided, being called, come, whereupon certain of them, to wit: George Johnson, Samuel R. Jennings, Thomas B. Hobbs, William W. Sullivan, Jas. T. Cameron, Alvan G. Stabler, William E. Brien, William H. Sunderland, John A. Rogers, Philip D. Boyd, William Devear, Samuel S. Cowman, are sworn to say the truth in the premises, and the said jurors so being empannelled and sworn to say the truth in the premises, upon their oath and affirmation do say, that the said Lewis Coleman is guilty of the premises aforesaid, in the indictment aforesaid, above specified and laid to his charge, in manner and form as by the said indictment is above charged upon him.

Thereupon it is considered by the Court here that the said Lewis Coleman do pay a fine to the said United States of fifty dollars, and the cost accrued upon the prosecution aforesaid. It is also considered by the Court here that the said Lewis Coleman be imprisoned in the Jail in Baltimore city for and during the term of twelve months; and the said Lewis Coleman is now committed by the Court here to the custody of the Marshal of the district aforesaid, by him to be taken and delivered into the custody of the Warden of the Jail of Baltimore city, there to be kept in safe custody, &c.

MEMORANDUM.

Verdict and judgment was rendered in this case on the 15th February, 1879.

INDICTMENT.

UNITED STATES OF AMERICA,
DISTRICT OF MARYLAND,

In the Circuit Court of the United States,
for the Fourth Circuit, in and for the Maryland District.

The Grand Inquest of the United States of America, for the Maryland District, inquiring for the body of that district, do, on their oaths, present, that heretofore, on the fifth day of November, in the year of our Lord eighteen hundred and seventy-eight, at the Fifth Congressional District of the State of Maryland, in the Maryland District aforesaid, a lawful election was held, whereat a Representative for that Congressional District in the Forty-Sixth Congress of the United States was voted for.

And the jurors aforesaid, upon their oath aforesaid, do further present, That a certain James McKenny was, then and there, a Supervisor of Election of the United States, duly appointed such by the Circuit Court aforesaid, pursuant to the two thousand and twelfth section of the Revised Statutes of the United States, for the fifth voting precinct of the Seventeenth Ward of the city of Baltimore in the said Congressional District, for and in respect of the election aforesaid, thereat.

And the jurors aforesaid, upon their oath aforesaid, do further present, That Henry Bowers, late of said district, yeoman, on the said fifth day of November, in the year aforesaid, at the Maryland District aforesaid, to wit: at the voting precinct aforesaid of said ward of said city, within the District and Congressional District aforesaid, (he being then and there a judge of said election, created such under the authority of the State of Maryland, at and for the voting precinct aforesaid), unlawfully did hinder and prevent the free attendance and presence at the poll of said election of

said precinct of the said Supervisor of Election, and his full and free access thereto, by then and there closing and shutting the door of admission of the room at and within which said poll of election then and there was, and was held, so as to prevent the said Supervisor entering the same; and by use of the authority of him, (the said Henry Bowers) as such judge as aforesaid, denying and refusing to admit the said Supervisor, then and there, into the same room, contrary to the fifteen hundred and twenty-second section of said Revised Statutes, and against the peace, government and dignity of the United States.

COUNT SECOND.

And the jurors aforesaid, upon their oath aforesaid, do further present, That the said Henry Bowers, afterwards, to wit: on the day and year aforesaid, at the said voting precinct within the District aforesaid, unlawfully did obstruct, hinder, and by the use of his power and authority as such judge as aforesaid, (which judge he then and there was), interfere with and prevent the said Supervisor of Election, in the performance of a certain duty in respect to said election required of him, and which he was then and there authorized to perform by the law of the United States, in such case made and provided, to wit: that of personally inspecting and scrutinizing, at the beginning of said day of election, and of the said election, the manner in which the voting was done at the said poll of election, by examining and seeing whether the ballot first voted at said poll of election was put and placed in a ballot box containing no ballots whatever, contrary to the fifty-five hundred and twenty-second section of said Statutes, and against the peace, government and dignity of the United States.

COUNT THIRD.

And the jurors aforesaid, upon their oath aforesaid, do further present, That the said Henry Bowers, afterwards, to

wit: on the day and year aforesaid, at the voting precinct aforesaid, in the city and district aforesaid, (he being then and there such judge of election as aforesaid), unlawfully (together with one Martin Burns, who was then and there a judge of said election in and for the same precinct), did obstruct, hinder, and in and by use of his power and authority as such judge as aforesaid, interfere with and prevent the said Supervisor of Election in the performance of a certain duty, in respect to the said election, required of him as such Supervisor by section two thousand and eighteen of said Statutes, to wit: the duty of personally scrutinizing, counting and canvassing each ballot cast at the said voting precinct at said election therein, contrary to the Statute of the United States, in such case made and provided, to wit: to section fifty-five hundred and twenty-two of said Revised Statutes, and against the peace, government and dignity of the United States.

ARCHIBALD STERLING, JR.,
Attorney of the United States for the District of Maryland.

Whereupon the said Grand Inquest having retired from the bar of the Court here, to enquire of and concerning the said indictment, afterwards returned the said indictment to the Court here thereon indorsed, to wit:

[A true bill.] W. B. BROOKS, *Foreman.*

And the said Henry Bowers having heard the said indictment read, saith that he is not guilty thereof, and hereupon puts himself upon the country, and Archibald Sterling, Jr., Esq., District Attorney aforesaid, who, for the said United States in this behalf prosecuteth, doth the like.

Whereupon the panel of petit jurors returned to the Court here by the Marshal of the District aforesaid, according to the Statutes in such case made and provided, being called, come, whereupon certain of them, to wit: Nathaniel

C. Dickinson, Philip Cross, Charles W. Beatty, William Galloway, James Z. Browning, Frisby J. Davis, Jacob Campbell, Skipwith C. Gorrell, Benjamin Chesney, William Brown, Arthur Stabler, James A. Lewis, are sworn to say the truth in the premises.

And the said jurors so being empanneled and sworn to say the truth in the premises, upon their oath and affirmation do say, that the said Henry Bowers is *guilty of the premises aforesaid in the second count in the indictment* aforesaid, above specified and laid to his charge in manner and form as by the said indictment, is above charged upon him, and not guilty of the premises aforesaid on the first and third counts in the said indictment, above specified and laid to his charge in manner and form aforesaid.

Thereupon it is considered by the Court here that the said Henry Bowers do pay a fine to the said United States of five dollars, and the cost accrued upon the prosecution aforesaid.

It is also considered by the Court here that the said Henry Bowers be imprisoned in the jail in Baltimore city for and during the term of twelve months; and the said Henry Bowers is now committed by the Court here to the custody of the Marshal of the District aforesaid, by him to be taken and delivered into the custody of the Warden of the Jail of Baltimore city, there to be kept in safe custody, &c.

MEMORANDUM.

Verdict was rendered in this case on the 15th of February, 1879, and judgment was rendered on same day.

NOTE.—Full copies of the records certified are all filed with the petition, but only indictments, verdicts and judgments have been printed, for convenience of reference.

NOTE OF ARGUMENT.

These cases involve the question of the constitutionality of certain sections of Title XXVI of the Revised Statutes, entitled "The Elective Franchise."

Sect. 2011. The Judge of the Circuit Court of the United States, wherein any city or town having upwards of twenty thousand inhabitants is situated, upon being informed by two citizens thereof, prior to any registration of voters for, or any election at which a Representative or Delegate in Congress is to be voted for, that it is their desire to have *such registration or election guarded and scrutinized*, shall open the Circuit Court at the most convenient point in the circuit.

Sect. 2012. The Judge shall appoint two Supervisors of Election for every election district in such city or town.

Sect. 2016. The Supervisors are authorized and required to attend all times and places fixed for registration of voters; to challenge such as they deem proper; to cause such names to be registered as they may think proper to be so marked; to inspect and scrutinize such register of voters; and for purposes of identification to affix their signatures to each page of the original list.

Sect. 2017. The Supervisors are required to attend the times and places for holding elections of Representatives or Delegates in Congress, and of counting the votes cast; to challenge any vote, the legality of which they may doubt; to be present continually where the ballot-boxes are kept, until every vote cast has been counted, and the proper returns made, required under any law of the United States, or any State, Territorial or Municipal law; and to personally inspect and scrutinize at any and all times, on the day of election, the manner in which the poll books, registry lists and tallies are kept; whether the same are required by any law of the United States, or any State, Territorial or Municipal laws.

These sections provide for "guarding and scrutinizing" the conduct of State officers, and the manner in which they hold the election under State laws.

Section 2021 requires the Marshal, wherever any election at which Representatives or Delegates in Congress are to be chosen, upon application by two citizens in cities or towns of more than twenty thousand inhabitants, to appoint Special Deputy Marshals, whose duty it shall be to aid and assist the Supervisors in the discharge of their duties, and attend with them at all registrations of voters or elections at which Representatives in Congress may be voted for.

Section 2022 requires the Marshal, and his General and Special Deputies, to keep the peace and protect the Supervisors in the discharge of their duties; preserve order at such place of registration, and at such polls; prevent fraudulent registration and voting, or fraudulent conduct on the part of any officer of election, and immediately to arrest any person who commits, or attempts to commit, any of the offences prohibited herein, or any offence against the laws of the United States.

These sections provide the power by which State officers of election are to be prevented from committing fraud on elections. The Supervisors are to guard and scrutinize the manner in which the State officers perform their duties, and the Special Deputy Marshals, to prevent them from committing frauds on the State laws. The Supervisors are to detect crime, and the Special Deputy Marshals are to arrest the criminal State Judges. These are the duties imposed by the Statute on these Federal officers.

Then follow the sections imposing punishments for the crimes detected by the Supervisors, and of the criminals arrested by the Special Deputy Marshals.

Section 5514 provides and enacts the particular kind of testimony which shall be sufficient to convict of any of these crimes. It declares that where the law of any State requires the name of any candidate to be voted for as Representative in Congress to be written on any ballot, with

the names of other candidates to be voted for at the same election as State, &c. officers, it shall be deemed sufficient *prima facie* evidence, to convict any person charged with voting, or offering to vote unlawfully, under the provisions of this chapter, to prove that the person so charged, cast, or offered to cast such a ticket, wherein the name of such Representative might, by law, be printed or written; or that the person so charged, committed any of the offences denounced in this chapter with reference to such ticket.

Thus the amount of evidence necessary to convict is designated and marked out.

Section 5515 enacts that *every officer of an election*, at which any Representative or Delegate in Congress is voted for, whether such officer of election be appointed, or created by or under any law or authority of the United States, or by or under any State, Territorial district or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof; or who violates any duty so imposed; or who knowingly does any act thereby unauthorized, with intent to affect any such election, or the result thereof; or who fraudulently makes any false certificate of the result of such election in regard to such Representative or Delegate; or who withholds, conceals or destroys any certificate of record so required by law, respecting the election of any such Representative or Delegate; or who neglects or refuses to make and return such certificate, as required by law; or who aids, counsels, procures or advises any voter, person or officer to do any act by this or the preceding sections made a crime; or to omit to do any duty, the omission of which is by this section made a crime; or attempts to do so, shall be punished as prescribed in section 5510.

This section defines such acts as, when done by State officers of election, shall be crimes.

Section 5522 enacts that every person, whether with or without any authority, power or process, or pretended authority, power or process of any State, Territory or Municipality, who obstructs, hinders, assaults, or by bribery, solicitation or otherwise, interferes with or prevents the Supervisor of Election, or the Marshal, or his general or special deputies, in the performance of any duty required of them, or which they may be authorized to perform by any law of the United States, in the execution of process or otherwise; or who, by any of the means before mentioned, hinders or prevents the free attendance and presence at, and full and free access to and egress from the place of registration or poll of election; or place of canvass of votes; or making any returns thereof; or who removes from any of these said places any Supervisor or Marshal, or threatens, or attempts to do so; or who refuses to assist the Supervisor and Marshal, or the Special Deputy Marshal, when required by them, or either of them, to give such aid, shall be liable to instant arrest, *without process*, and shall be punished by fine and imprisonment.

This section extends the panoply of perfect immunity over the Supervisor and the Special Deputy Marshal at the times specified. No Sheriff, *with process* from any State Court, can arrest either of them for any crime, but they can instantly arrest the Sheriff, without process, for attempting to execute his writ.

All State laws on those days are prostrate under the feet of the Supervisor and the Special Deputy Marshal, and all State officers as well, for no matter what infraction of State laws they commit, nor what duties State officers perform, the State laws are paralyzed and the State officers powerless.

Such are the provisions of law for guarding and scrutinizing the elections, and for providing the means whereby State officers can be compelled to do their duty.

This being the state of the law, as set out on the Statute book, the petitioners were convicted under these sections, and duly sentenced to prison, where they now are.

They were all judges of the election for Representatives in Congress, held in the city of Baltimore on the 5th day of November, 1878, appointed under the laws passed by the Legislature of Maryland, which had also prescribed the time, place and manner of holding elections for Representatives in Congress. They have been indicted, tried, convicted and imprisoned as State Judges of Election, appointed under State authority to execute State laws.

Siebold has been convicted on the eighth count of the indictment against him, which charged him, that being a State Judge of Election he knowingly *did an act unauthorized by any law of the State of Maryland*, and unauthorized by any law of the United States, by then and there, at said election, clandestinely and fraudulently, putting in the ballot-box of the precinct, certain ballots, after the voting at said precinct at said election had begun, and before the ballots lawfully deposited in the ballot-box had been counted, with intent to affect the same election, and the result thereof.

Tucker was convicted on the second and fifth counts of the indictment against him.

The second count charges that he, being a Judge of Election, created as such under the laws of Maryland, did unlawfully, and by the exercise of his power and authority as such judge, prevent and hinder a Special Deputy Marshal in his free attendance and presence at the polls, and his full and free access to the said poll.

The fifth count is identical with the one on which Siebold was above convicted, to wit: being a State Judge, doing an act unauthorized by the laws of Maryland, or of the United States, with the intent to affect such election, and the result thereof.

Burns plead guilty to the indictment against him, which charged him in four counts, that being a State Judge of Election he did, by the use of his authority and power as such judge, unlawfully interfere with a Supervisor of Elec-

tion, in the due discharge of his duty of inspecting and scrutinizing the manner in which the voting was done at the polls; and of being present within the room where the poll of election was being held; and of resisting a Marshal and a Special Deputy Marshal from arresting him for his offences against the Supervisor.

Coleman was convicted on the indictment against him, which charges that he, being a State Judge of Election, by the use of his authority as State Judge, did hinder and prevent a Special Deputy Marshal from doing his duty required of him by law, being the duty of free attendance at the poll, and of supporting and protecting a Supervisor of Elections. It also charges that being a State Judge of Election he did an act not authorized by the laws of Maryland, or of the United States, with intent to affect the result of the said election.

Bowers was convicted on the second count of the indictment against him, which charges that he, being a State Judge of Election, and by the use of his authority as such Judge, did obstruct, hinder and prevent a Supervisor of Election in the performance of his duty, of personally inspecting and scrutinizing at the beginning of the election the manner in which the voting was done at the election, by examining and seeing whether the first ballot was put in a ballot-box containing no ballots whatever.

These are the charges on which the petitioners have been tried, convicted and sentenced, and under which they are now suffering imprisonment, from which imprisonment they pray to be delivered by Habeas Corpus.

If these Statutes under which they are imprisoned are void, they are entitled to their liberties.

If they are valid exercises of legislative p wer, then the petitioners are without wrong.

We shall attempt to demonstrate that the power exercised by Congress, through these sections of the Revised Statutes, is not granted by the first clause of the fourth sec-

tion of the first article of the Constitution, and is not a constitutional exercise of the power to make by law such regulations as to the times, places and manner of holding elections for Representatives in Congress, as is granted by the said clause.

We shall attempt to establish these propositions.

1. That the power to make regulations as to the times, places and manner of holding elections for Representatives in Congress, granted to Congress by the Constitution, is an exclusive power when exercised by Congress.

2. That this power, when so exercised, being exclusive of all interference therein by the States, must be so exercised as not to interfere with or come in collision with regulations presented in that behalf by the States, unless it provides for the complete control over the whole subject over which it is exercised.

3. That when put in operation by Congress it must take the place of all State regulations of the subject regulated, which subject must be entirely and completely controlled and provided for by Congress.

Before entering upon the immediate discussion of these propositions, it is necessary to make a preliminary examination of the origin and development of the American institutions of free government, and of the organization of the American Constitutions under them.

The American Constitutions were the development by natural evolution, from time, place and circumstance, of those institutions of Anglo Saxon liberty, which had been the growth of centuries of struggle between power and the sturdy spirit of liberty of our ancestors.

Class after class forced itself forward into the enjoyment of rights, which were continually enlarged by their growing power and intelligence, and to which, in turn, they as constantly admitted others. Rights achieved were se-

cured by guarantees against power, and checks upon its absolute exercise.

Trial by jury was the substitution of the judgment of twelve men, for the irresponsible will of one or many.

Magna Charta was a grant of security of life, limb and member, and property, as well against the strong hand; and it provided that twenty-five Barons should be guardians of the liberties thereby granted, with the right and duty of making war on the King whenever he denied any of those privileges.

And as property and intelligence increased, further checks and safeguards were devised.

Parliament was the great council of the King, summoned by his royal mandate to inform and advise with him.

His Chancellor issued writs of summons and election, and likewise decided upon the returns thereof, whether they had been properly executed and the proper Councillors had been sent up in obedience to his mandate. But in time the people began to claim the right to participate in government, with larger liberty and more effective interference. They long claimed the right to pay only such taxes as their representatives had levied, but it was not until the reign of the Tudors had passed that they asserted and exercised the power of free deliberation and action in their law making assembly.

In the reign of James the First, the Commons insisted that they should be sole judges of the election, qualification and return of their members, and that writs for elections should be issued only by their speaker. Thus was achieved the right to make their own laws, and levy their own taxes, after full and free debate, and statement of grievances. And still further, to secure this liberty, privilege of Parliament was extended so as to give the Commons power to protect itself against all intrusion.

Close following these came the Petition of Right, the armed protest against infringement of their rights by the

Commons and the Commonwealth, the Declaration of Rights, the expulsion of the King, and the Bill of Rights.

In every struggle the rights claimed, had been asserted and maintained against power, sometimes by peaceable guarantees, and again by forcible redress.

And the history of England, for seven centuries, had been the history of the successive struggles of advancing liberty against absolute and irresponsible power, and every right gained had been secured by force, or by guarantees, backed by force: by checks and safeguards, protected by the strong hand. So, after the revolution of 1688, such an advance had been made that the wide, vague and unlimited power of Parliament stood as the ultimate peaceable protection and security of the rights of Englishmen against usurpation by King, Church or Nobles.

Up to that time experience had shown that rights could only be achieved and secured by force, and that power was the only thing to control power.

The intuitive sagacity of Coke—Saxon and English as he was to the bone—lover of liberty and of common right—for the common law was the bulwark, the sword and the shield of common right—had perceived at the beginning of that great movement, that unless some peaceable means were devised by which power could be held in check, arms and the *ultima ratio* must of necessity continue the only safeguard of liberty.

His axiomatic logic and transcendent genius satisfied him, that this peaceable check could be best deposited with the judiciary; and in Dr. Bonham's case, in 8 Reports, 118, in 1616, he declared "that the common law shall control acts of parliament, and sometimes shall adjudge them to be merely void, for where an act of Parliament is against common right and reason, the common law shall control it and adjudge it to be void." Lord Campbell says "this is a foolish doctrine, alleged to have been laid down extra judicially in Bonham's case."

1 Campbell Lives of Chief Justices, 298.

But the seed thus planted by Coke blossomed in America, and bore fruit in the independence of the Judiciary, with the power to declare void not only acts of Legislatures, but also executive acts, whenever either of those departments of the government transcend the power committed to them—a discovery, says Lord Brougham, in political science, the greatest, the wisest, and the most beneficial that had been made since the grant of the Great Charter, with its armed sanction.

This history was well known to our ancestors, who framed the American Constitutions. The fathers of some of them had borne arms in the struggle between William of Orange and James II. The grandfathers of others had fought in the great rebellion. The grandfather of George Mason, the author of the Bill of Rights of Virginia, had commanded a royal regiment at Worcester fight.

The lessons of those times were deeply impressed on and thoroughly appreciated by them. From them they learned; they knew that power concentrated in one centre is destructive to liberty; that power divided among many, each acting as check on the other, tends to preserve and perpetuate liberty. The safeguards devised by the experience of their Anglo-Saxon ancestors had, in the main, been based on force, and had relied on the strong hand for preservation and enforcement. But they knew that to preserve their liberties, inherited from the struggles of centuries, enlarged by their own virtue and valor, the powers of society, which were necessary for government, must not be concentrated to be exercised from one or two or a few central organizations, but must be separated and divided among as many as possible, consistent with efficient administration; and these separations of the repositories of power must be effective, and prevent any collision or fusion between them. While they knew that the sanction of liberty and order in society ultimately rests on force, they believed that by thus dividing the governmental functions between different de-

partments, which should mutually check and guard each other, they would remove as far as possible the necessity for the recourse to force to prevent or to remedy usurpation of power, and to preserve their liberties.

All the old systems were studied. The organizations of Athens, of Rome, of Poland; the checks of the ancient republics; and the balance of all the popular governments of classic times, were discussed in the public journals, by pamphlets, in addresses and writings.

The debates in the convention of 1787, and in the State conventions; the papers of the Federalist, and contemporaneous discussions like John Adams' Defence of the American Constitution, exhausted all history—sacred and profane—in their examinations of the experience of former nations who had achieved, who had maintained, and who had then lost their liberties.

The discussion in America, from 1764 to 1790, on the nature and objects of government, is without parallel in recorded history, for its knowledge, analysis and logic; and the experience of their ancestors, illuminated by the light of the history of other people, taught them that power, by its own nature, always tends to extend itself, and by the law of its existence, constantly develops and expands itself; and, therefore, they understood and clearly appreciated that the work for them to do, and the problem for them to solve, was to organize government for society, so as to preserve the largest liberty with the least risk of losing it by usurpation.

In the infancy of States, says Montesquieu, men mould institutions; in their maturity, institutions mould men.

So the men of America—hardy, frugal, self-reliant; conquering the savage and the wilderness by their own individual will and strength—had established institutions in which all men were equal in rights; for privileges could not exist among the freeman of the forest—equal in station; for courage and manhood make peers of all—and equal in fortune; for each had equal enjoyment to the earth, the air

and the water. These institutions recognized all men as free and equal, and with equal rights to life, liberty and the pursuit of happiness. They were the outgrowth of the circumstances; the product of the time and place in which men found themselves. They were the institutions of the pioneer, the hunter and the woodsman, adopted by the society which sprang from their efforts; and they had developed a race of men who were strong enough and had will enough to unite and combine this vital principle with the institutions of their ancestors, and by a natural evolution, develop the plan of government under which we live.

The people of America had grown up under separate political societies, originating under different nationalities, impulses and objects. They had at last been arranged with similar relations to the government of Great Britain, and had long been increasing in power and strength under the fostering care of institutions of local self-government, long rooted in England from the time of the Heptarchy.

There cities, boroughs and hundreds, had enjoyed, by common right, whereof the memory of men recorded no beginning—or by royal grant; by royal grace; or won by their own arms, from the fears, the weakness or the necessities of their monarchs, many privileges of security for person and property, and many safe guards for them.

Here their charters gave them the right to try all felonies, except treason, by Courts of their own creation, as in the case of Yarmouth, whose charter was granted by John. There they exercised the power of arming and disciplining their own citizens for the maintenance of order in their midst, as in the case of the Trainbands of London. This one enjoyed the privileges of free commerce. That one was exempted from feudal burdens; and before the settlement of the colonies, the practice and enjoyment of municipal rights and liberties were firmly fixed in England, as they had been for centuries in the republican cities of Italy or the free

towns—the growing centres of free thought and civilization in Western Europe.

These rights our ancestors brought with them to these shores, and they were firmly planted and deeply rooted here.

Whether under the Royal grant to a corporation, as in the case of Virginia; or to an individual, as the grant to Baltimore; or for a commercial enterprise, as of New England or Carolina; each community soon claimed for itself the right to govern itself in many matters of vital and local concern, and soon they asserted larger power than had ever been claimed by any corporation under the common law; and as distinct, separate and several political societies, long before the revolution, had assumed all the rights of local self-government, making their own laws to suit their own wants, and bound only by the acts of the mother country in those matters of exterior or general concern, which they individually were incompetent or unwilling to undertake for themselves. These rights of local self government they exercised, equally jealous of interference by each other, or by the Crown or Parliament. They exercised as separate political societies, that large mass of govermental function, which pertains to the protection of society, leaving only those parts of such functions as pertained to their relations to each other, and to foreign nations, to be regulated by the government of Great Britain. Of all internal affairs each one assumed entire control; in all external relations all of them were subject to the dominion of the mother country.

But in time these relations proved unsatisfactory. The subordinate political societies were discontented with the manner in which the paramount government performed its part of the governmental functions. They, therefore, met as colonies in Congress, and as colonies and Englishmen consulted and acted together, for defence of their common rights, as their fathers had done against Charles I and James II.

They claimed and insisted that "their ancestors, at the time of their emigration, were entitled to all the rights, liberties and immunities of free and natural born subjects within the realm of England."

Resolution of Congress, October 14, 1774.

And on the 8th of July, 1775, their deputies in Congress all signed a petition to the King, "with a view to reconcile differences."

But, nevertheless, the people of North Carolina had fought the King's governor at Alamance, in the summer of 1774, and the freemen of Massachusetts had driven back the King's troops on the 19th of April, 1775; and this very Congress had appointed a commander-in-chief of its armies on the 15th day of June, 1775.

North Carolina declared her independence of the Crown on the 19th of May, 1776; Virginia on the 29th of June, 1776; and Maryland on the 4th of July, 1776.

They were asserting the rights of Englishmen to resist usurpation by arms.

And on the 4th of July, 1776, each one of these societies became, by the force of their own arms, States—separate political societies. Each one became "a State—a moral person, which is a complete body of free natural persons, uniting together for their common benefit; having an understanding and a will; deliberating and resolving; possessed of interests which it ought to manage; enjoying rights which it ought to maintain; and lying under obligations which it ought to perform."—James Wilson.

And each of these States, or moral persons, became at once, in itself, entitled to all powers of government of every kind which can be exercised by society.

They were founded on the principles set forth in the Declaration of Independence. That instrument was the necessary and logical result of the principles of English

liberty, operating on the times, circumstances, and the people living in them.

The Great Charter was a *grant* of enumerated *privileges* from a superior to certain inferiors.

The Petition of Right was an application by inferiors to their King, to acknowledge certain *rights* claimed.

The Declaration of Rights was an assertion of rights, insisted on as appertaining to freemen, and the Bill of Rights was the guarantee of those rights by King, Lords and Commons, by common consent. Still this was only of certain defined rights, belonging to certain classes. They had struggled on from a grant of a few franchises to a small class, to the guarantee of many rights to the large mass of society.

But the Declaration of Independence disclaimed all ideas of grants, or petitions, or guarantees, of special privileges or class rights; threw down all barriers; swept away all distinctions; ignored and denied all theories of social compacts between rulers and people; and asserted, established and proclaimed the *fact*, as it existed then and there, of the equal and inalienable right of all men to every franchise, and to all rights for the whole people who had taken arms and embarked in a common enterprise.

Thus was born the sovereignty of the people.

And these States were thus formed on these principles. The people of each State, sovereign, and entitled to all the powers which society may exert for its preservation, and men may use for the promotion of their happiness; and each man in each State equal in rights to every other man.

To maintain these rights and principles, the articles of confederation were formed. But "it was the strong sympathies, not the feeble government which bound the States together during a common war."

This government proved inefficient to protect the liberties inherited and achieved, and for the sole and only purpose of forever perpetuating, protecting and transmitting to

us, their posterity, and to ours, in turn, all the rights, privileges and immunities of free and natural born Englishmen, together with the equal rights won by themselves for every man to participate in political power, and to be protected in life, liberty and property, our ancestors framed the Constitution under which we live.

All govermental power resided in and emanated from the people in each State. If the immense mass of power, necessary to regulate the extensive territory of America, were concentrated in one centre, it was evident such concentration would inevitably and speedily destroy all liberty. For power to govern such a population, as this territory must soon contain, would have, of necessity, to be so strong as to be without check. On the other hand, if the power were left in each State, by itself, to govern itself, it would not be sufficient to protect the weak from the strong among the States themselves, nor any of them, from the ambition of foreign nations. It was necessary, therefore, so to unite this power that it would be strong enough, and so to divide it that it would be not too strong—the first for protection ; the last for liberty.

The functions of government in the best days of Rome were divided between the *comitia centuriata* and the *comitia tributa*. In Athens the power was distributed between the Senate, which prepared the laws, and the people, who ratified or rejected them.

In England, with whose recent experience all were familiar, the powers of society had only recently been separated between the executive, legislative and judicial departments, although, without clear division. And the struggles for liberty in England, more than any anything else, colored the deliberations of the men of the revolution, and directed their action.

That all men were entitled to equal rights, and that all political power equally resides in them, was their belief, and to preserve and perpetuate these rights, this power must be organized and used.

The object then being the protection of all—the means being the whole power of society—they devised a system of checks and balances, for the accomplishment of this object by these means, without parallel for simplicity, wisdom and strength.

The principle announced by Montesquieu, that the separation of the functions of government between the executive, the legislative and the judicial departments is necessary for the preservation of liberty, was applied and extended far beyond his suggestion.

All the people of all the States could doubtless have formed a government, and vested all power in it; or they could have found two governments, dividing the powers between them; or they could have organized one government to exercise certain specified powers, and other complimentary governments to exercise all the remaining functions. But they did none of these things.

They preserved the States as they existed. They delegated certain general powers to be exercised for the protection of all the States, and all the people, to one central government, and distinctly defined the extent of the grant to it.

They retained State governments to exercise a large mass of power, but by written constitutions prohibited them from exercising certain other powers; and all the residue of political power they retained in themselves. But above and beyond all, they retained in their own hands the right and power to change, overthrow, alter and amend both or either of these agencies at their will and pleasure. Being the creator they reserved full power at any time to destroy; being principal they retained the right at any time to revoke the agency.

By this scheme of the division, separation and reservation of powers, it was hoped and believed that the most perfect system of government ever known had been devised and put in operation.

The division and separation were so perfect, that it was believed that the checks would so operate on each other as to render any future appeal to force against wrong, improbable, if not impossible.

The Federal government was made a check on the State governments, and was authorized to prevent their exercising powers prohibited to them. If the Federal government usurped power reserved to the States or to the people, the States, through their Senators, were intended to check it. But beyond this separation and division of powers between Federal and State governments, each operating to keep the other in its place, they further divided and separated the functions entrusted to each government between these several and distinct departments in each. The powers entrusted to the Federal government were divided between the executive, legislative and judicial departments, with clear and precise provisions to prevent either department infringing upon or usurping the duties imposed upon any other. And the same provisions were made as to the State governments. Therefore, such powers as were considered necessary and proper were imparted to the two governments, and the residue were reserved to the people acting through their States.

Ample provision was made that neither government should trench upon the province of the other, and to render collision impossible, it is declared that the Federal government shall be the ultimate arbiter in case of dispute between the two governments, as to their proper functions.

And further checks were provided by the division and separation of the powers of each between their distinct departments.

But over and above all these checks, they devised a further, and stronger, and more efficient one than any known to the history of England. To the judiciary department of both governments was entrusted a veto upon the acts of both the other departments of both governments, with the right of ultimate decision in the Federal judiciary.

Under this power, every judge, Federal and State, can pronounce any act of any executive or Legislature, Federal or State, void, because contrary to the constitutions of the two governments.

Under this system, absorption by the one government of the functions of the other is as equally forbidden as the usurpation by one department of the powers of the other; each one must be kept separate, distinct and apart, neither touching, nor interfering, nor colliding the one with the other.

Let each move in their separate orbit, and the whole organization moves smoothly and safely. Any attrition between any of the parts throws the whole out of order.

With this review of the causes and objects of the formation of the Union and the Constitutions of America, it is respectfully submitted that no question can arise of strict construction, or liberal construction, concerning the charters or written grants of power to these governments, coordinate and together making one whole.

The intention of the people, from whom they proceeded, was to allot and divide out certain governmental functions to two governments, and to three different departments in each of them. To make those allotments and divisions so clear and distinct, that no confusion could possibly arise, whereby one government or one department could absorb or usurp any of the functions of another government, or another department; their object being to protect their own liberties by making each government, and each department, such a check and balance on the others, that in no event could one preponderate or over-balance any other one.

The two governments were intended to move in separate orbits. No contact was ever to occur between them.

Two spheres in the same atmosphere, with no physical connection, but deriving all their living powers of light, heat and motion from the same source—the sun of popular rights. Each government has its separate and distinct

machinery. The Federal government acts on its citizens by its laws, through its officers; the States act on their citizens by their laws, executed by their officers. Neither can command nor control the officers of the other.

Hence it follows:

First.

THAT THE FEDERAL GOVERNMENT CAN NO MORE INTERFERE WITH THE POWERS INTRUSTED TO THE STATES, THAN THE STATES CAN WITH THOSE DELEGATED TO THE FEDERAL GOVERNMENT.

In the language of the late Chief Justice, in Texas vs. White, 7 Wallace, "not only, therefore, can there be no loss of separate or independent autonomy to the States through their Union under the Constitution, but it may not be unreasonably said, that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the national government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States." And the present Chief Justice, in Cruikshank's case, 92 United States Reports, announces the same proposition in declaring "the government thus established and defined is to some extent a government of the States in their political capacity. It is also for certain purposes a government of the people. Its powers are limited in number, but not in degree. Within the scope of its powers it is supreme, and above the States; but beyond it has no existence."

Rights acquired under Federal laws may be enforced in State Courts—

Claflin vs. Houseman, 93 U. S. 130,

just as rights acquired under State laws are enforced in Federal Courts. But this is because the Courts of all civilized countries are open to protect the rights of persons within their jurisdiction, no matter where those rights were ac-

quired. English Courts enforce French laws, and *vice versa*, as the Courts of the United States will enforce a right acquired under a State law for the sale of slaves after such law is repealed.

White vs. Hart, 13 Wallace, 646.
Exparte McNeil, 13 Wallace, 243.

It is the rights that are protected.

In the Collector vs Day, 11 Wallace, the Court, speaking by Mr. Justice , says: "If the means and instrumentalities employed by the Federal government to carry into operation the powers granted to it are necessary, and for the sake of self preservation exempt from taxation by the States, why are not those of the States, depending on their reserved powers, equally exempt from Federal taxation? Their unimpaired existence in the one case, is as essential as in the other. * * * In both cases the exemption rests upon necessary implication, and is upheld by the great law of self-preservation—*as any government, whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government.*"

So it is held that Congress has no power to interfere with the taxing power of a State.

Lane Co. vs. Oregon, 7 Wall. 75.
U. S. vs. R. R. Co., 17 Wall. 326.

Nor can Congress vest any part of the judicial power in a State officer.

Martin vs. Hunter, 1 Wheat. 304.

Nor can any man be required to perform a Federal function, unless he holds a Federal office. (Const., article 2, section 3.) "The President shall commission all officers of the United States."

A. The Congress can adopt State laws, which thereby become laws of Congress, but they must be executed by officers of the Federal government, *e. g.*, the Process Act,

Parker vs. Milldam Co., 20 Maine, 355.
Glover vs. Powell, 10 New Jersey Eq. 211.
Woodman vs. Kilbourn Manf. Co , 1 Abb. C. C. 158.
Sturgis vs. Crowninshield, 4 Wheat. 122.
Ogden vs. Saunders, 12 Wheat.
Chirac vs. Chirac, 2 Wheat. 259.
Dred Scott's case, 19 Howard.
Prigg vs. Penn., 16 Pet. 611.

A. States can make bankrupt and naturalization laws until Congress exercises the power, when State laws are superseded.

Sturgis vs. Crowninshield.
Ogden vs. Saunders.
Chirac vs. Chirac.
Dred Scott's case.

B. States can punish counterfeiting coin until Congress acts.

Fox vs. Ohio.
U. S. vs. Marigold.

C. States can and do fix the standard of weights and measures.

D. Wherefore it is not the existence of the power, but the exercise of it which is incompatible with the exercise of it by the States.

Sturgis vs. Crowninshield.

Third.

BUT WHERE THE POWER IS NATIONAL IN ITS CHARACTER, THE STATES CANNOT EXERCISE IT, ALTHOUGH IT BE DORMANT AND NOT PUT IN FORCE BY THE FEDERAL GOVERNMENT.

In Holmes vs. Jennison, 14 Pet. 574, the Governor of Vermont had siezed Holmes, who was a fugitive from the justice of Canada, and held him, to be delivered up to the Canadian authorities. The cause coming before this Court, Chief Justice Marshal, speaking for himself and Justices Story, McLean and Wayne, held that the right of intercourse and agreement with foreign States was delegated to the United States, and forbidden to the States.

"It is admitted that an affirmative grant of power to the general government is not of itself a prohibition of the same power to the States, and that there are subjects over which the Federal and State governments exercise concurrent jurisdiction.

But when an authority is granted to the Union, to which a similar authority in the States would be absolutely and totally contradictory and repugnant, then the authority of the Federal government is necessarily exclusive, and the same power cannot be constitutionally exercised by the States. * * * The power in question from its nature cannot be a concurrent one, to be exercised both by the States and the general government. It must belong exclusively to the one or the other. * * * It is the power of deciding the very delicate question, whether the party demanded ought or ought not to be delivered up. * * *

"When the nature of the power requires that it should be exercised exclusively by Congress, the subject is as completely taken from the State Legislatures as if they had been expressly forbidden to act."

State Freight Tax, 15 Wall. 232.
Cooley vs. Phila., 12 How. 299.
Kellogg vs Union Co , 12 Conn. 7.
Parker vs. Milldam Co., 20 Maine, 355.
Glover vs. Powell, 10 N. J. Eq 211.
Woodman vs. Kilbourn, 1 Abb. C. C. 158.
Gilman vs. Phila., 3 Wall. 375.

Hence it appears—

First.

THAT THIS IS A GOVERNMENT OF CO-ORDINATE GOVERNMETS, EACH WITH CO-ORDINATE DEPARTMENTS.

Second.

THAT ALL POWERS OF GOVERNMENT CONSIDERED NECESSARY BY THE PEOPLE TO BE EXERCISED, HAVE BEEN DIVIDED—FIRST, BETWEEN THE TWO GOVERNMENTS; AND SECOND, BETWEEN THE THREE DEPARTMENTS OF EACH.

Third.

THAT THESE POWERS ENTRUSTED TO THE TWO GOVERNMENTS ARE SOME OF THEM EXCLUSIVE, AND SOME CONCURRENT; AND THAT WHEN ANY OF THE CONCURRENT POWERS ARE EXERCISED BY THE FEDERAL GOVERNMENT IT BECOMES AT ONCE EXCLUSIVE, AND BY ITS OWN FORCE EXPELS AND SUPERSEDES THE STATE POWER APPLIED TO THE SAME SUBJECT.

Fourth.

THAT COLLISION BETWEEN THE TWO GOVERNMENTS IS, THEREFORE, CONSTITUTIONALLY IMPOSSIBLE, AND WHENEVER SUCH COLLISION IS BROUGHT ABOUT, IT IS BECAUSE ONE OF THE GOVERNMENTS HAS TRANSCENDED ITS POWERS OR EXERCISED THEM IN A MANNER NOT WARRANTED.

Fifth.

THAT THIS EXCLUSIVE AND THEREBY PARAMOUNT POWER, WHEN APPLIED TO A SUBJECT, MUST, OF NECESSITY, CONTROL AND PROVIDE FOR THE WHOLE OF THAT SUBJECT—OTHERWISE IT WOULD LEAVE A PART OF IT UNPROVIDED FOR, WHICH IT HAS NO RIGHT TO DO, AS IT THEREBY PRODUCES COLLISION.

With these propositions established, it is proposed to consider the scope and operation of the first clause of the fourth section of the first article of the Constitution of the United States, the source from which the power of Congress now under consideration must be drawn, if it can be drawn at all from that instrument.

It is, "the times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators."

The history of that clause is this—

As soon as the convention which framed the Constitution of 1789 was ready for business, Governor Randolph, of Virginia, brought forward his plan, since known as the Virginia plan for a government for the Union, in the form of fifteen resolutions. The third of these was that the members of the first branch of the National Legislature ought to be elected by the people of the several States every year, for the term of ——, &c.

On the same day Mr. Charles Pinckney laid before the House the draft of a Federal government, which he had prepared. This was in the form of a regular Constitution, divided into sixteen articles, and was the precedent for the form and manner in which the Constitution was subsequently adopted. Article V of this draft is the germ from which article 1, section 4 of the Constitution was subsequently developed It is: "Each State shall prescribe the time and manner of holding elections by the people for the House of Delegates; and the House of Delegates shall be the judges of the elections, returns and qualifications of their members" (5 Elliott's Deb. 128.)

After a long debate the House came to certain resolutions, indicating their determination of what the powers of the new government should be, which resolutions were referred to a Committee of Detail, to arrange the Constitution thus agreed upon into formal articles and sections.

This article in Mr. Pinckney's draft was neither considered nor debated in convention, but notwithstanding this it reappears in the draft of a Constitution, reported by the Committee of Detail; being in the main the present Constitution; but Mr. Pinckney's article was greatly enlarged and altered. It was reported thus:

"Art. VI, sec. 1. The times, and places, and manner of holding the elections for the members of each House shall be prescribed by the Legislature of each State; but their provisions concerning them may at any time be altered by the legislation of Congress."

This is the first intimation of any power in Congress to intermeddle in any manner with elections of members of Congress. (5 Elliott, 377.)

On the 9th of August, 1789, this sentence and clause came on to be debated. Mr. Madison and Mr. Gouverneur Morris moved to strike out "each house" and insert "the House of Representatives;" the right of the Legislature to regulate the times, places and manner of electing Senators, being involved in the right of appointing them, and the motion was disagreed to.

The first part having been agreed to *nem con*, Mr. Pinckney and Mr. Rutledge moved to strike out the remaining part, "but their provisions concerning them may at any time be altered by the Legislature of the United States. The States, they contended, could and must be relied on in such cases.

Mr. Gorham. It would be as improper to take this power from the National Legislature as to restrain the British Parliament from regulating the circumstances of elections, leaving this business to the counties themselves.

Mr. Madison. It seems as improper in principle, though it might be less inconvenient in practice, to give the State Legislatures this great authority over the election of the representatives of the people in the General Legislature as it would be to give the latter a like power over the election of their representatives in the State Legislatures. He was supported by King, Morris and Sherman, and the motion was lost. The word "respectively" was inserted after the word "State."

The clause was then amended by the words "their provisions concerning them" being stricken out and "regulations in such cases" inserted; the clause then reading:

"But regulations in each of the foregoing cases may, at any time, be made or altered by the Legislatures of the United States."

This was meant to give the National Legislature a power not only to alter the provisions of the States, but to make regulations, in case the States should fail or refuse altogether. (Madison's Debates, 5 Gill, 401.)

The Constitution reported by the Committee of Detail having been discussed, altered and amended in divers particulars, was then referred to another committee, "to revise the style, and arrange the articles which had been agreed to by the House."

This committee reported the Constitution in almost the exact language in which it is now set forth.

The entire work of re-writing, revising and polishing the work of the convention was done by Gouverneur Morris with his own hands. The clause under consideration was reported in the exact words in which it now stands, except that the words "except as to the places of choosing Senators" was added by the convention "*nem-con*" to the end of it, in order to exempt the seats of government of the States from the power of Congress. (Madison's Debates, 5 Elliott, 401-542.)

The Constitution thus framed was then submitted to the Congress of the Confederation, and by it forwarded to the government of each State, to be considered in convention. It was duly ratified by nine States, and went into operation by their secession from the Confederation, which, in their preamble, and also in the clause of ratification of its Constitution, were declared to be a "Confederation and perpetual Union."

But the power thus granted to Congress over the election of Representatives was fiercely assailed in every convention of which there are recorded proceedings. Probably no clause in the Constitution was discussed with a more searching analysis, or attacked with more forcible logic. It was charged on the one hand that it gave the Congress the power to order the elections of members of Congress for

Georgia to take place on the Mohawk river, and would enable them to perpetuate themselves without end.

It was defended mainly on the ground—

1st. That it might be used to correct the negligence in elections, of electors themselves.

2d. That it would prevent the dissolution of the government by designing and refractory States.

3d. That it would operate as a check in favor of the people against any designs of the Federal Senate, and their constituents, the State Legislatures, to deprive the people of their right of election.

4. That it provides a remedy for the evil, should any State, by invasion or other cause, not have it in its power to appoint a place where the citizens thereof may meet to choose their Federal Representatives. (Debates in Massachusetts convention, 2 Elliott, 61, 62.)

Messrs. Pierce and Bishop, in that convention, urged that "Congress may require a majority of all the votes in a State to elect, or may order an election to take place in Boston.

"The House of Representatives form the Democratic part of the Government; the Senate represents the States. Now, the Democratic part ought not to be interfered with by the States. The elections by the people of their Representatives ought not to be interfered with by the Senate, unless the States refuse to hold elections. Therefore, section 4, article 1 of the Constitution ought to be amended so as to read, 'but if any State refuse or neglect so to do,' Congress may make or alter such regulations, &c." (2 Elliott, 51.)

In reply to this, it was argued by Strong, "that the power to regulate Federal elections must be lodged somewhere; and there are but two bodies wherein it can be lodged: the Legislatures of the several States and the general Congress. The State Legislatures, said he, are the best, but if they refuse to do so, the General Government will be dissolved unless Congress acts."

"Mr. Cabot said: The House represents the people; the Senate the States. If the States are allowed unrestricted power in regulating elections of the people's House, the States may make the House their representatives, and thus destroy the balance between the two."

The conduct of Rhode Island was dwelt upon, in withdrawing her delegates from the Confederacy at a critical period. It was stated that measures of vital importance had been defeated in Congress by the withdrawal of the Rhode Island delegates and their factious refusal to return, although the Government of Rhode Island had been requested, by a resolution of Congress, to send them or other delegates back. (2 Elliott, 52.)

The result of all this was that the Constitution was ratified by the convention of Massachusetts, with the distinct understanding that certain amendments should at once be made to it. Among these amendments was this:

"III. That Congress do not exercise the powers vested in them by the 4th section of the 1st article, but in cases when a State shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress, agreeably to the Constitution." (2 Elliott, 180.)

So, likewise, New Hampshire ratified it with this declaration:

"And as it is the opinion of this convention that alterations would remove apprehensions and fears, and more effectually guard against the undue administration of the Federal Government;" and, therefore, they recommended amendments, of which the third was: "That Congress do not exercise the powers vested in them by the 4th section of the first article, but in cases when a State shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation; nor shall Congress at any time make regulations contrary to a free and equal representation." (1 Elliott, 358.)

New York also proposed as one of her amendments, "That the Congress shall not make or alter any regulation in any State respecting the times, places and manner of

holding elections for Senators and Representatives, unless the Legislature of such State shall neglect or refuse to enact laws or regulations for the purpose, or from any circumstances be incapable of making the same; and then only until the Legislature of such State shall make provision in the premises; provided that Congress may prescribe the time for the election of Representatives." (1 Elliott, 364.)

Rhode Island proposed the same in substance:

"That Congress shall not alter, modify or interfere in the times, places and manner of holding elections for Senators or Representatives, or either of them, except when the Legislature of any State shall neglect, refuse, or be disabled, by invasion or rebellion, to prescribe the same; or in case when the provision made by the State is so imperfect as that no consequent election is held; and then only until the Legislature of such State shall make provision in the premises." (1 Elliott, 372.)

The ratification of South Carolina was accompanied by, and made part of, the following preamble and resolutions:

"And whereas, it is essential to the preservation of the rights reserved to the several States and the freedom of the people, under the operations of a General Government, that the right of prescribing the manner, time and places of holding the elections to the Federal Legislature should be forever inseparably annexed to the sovereignty of the several States. This convention doth declare that the same ought to remain in, to all posterity, a perpetual and fundamental right in the local, exclusive of the interference of the General Government, except in cases where the Legislatures of the States shall refuse or neglect to perform or fulfil the same according to the tenor of the said Constitution."

* * * "Resolved, That it be a standing instruction to all such delegates as may hereafter be elected to represent this State in the General Government, to exert their utmost abilities and influence to affect an alteration of the Constitution, conformably to the aforegoing resolutions." (1 Elliott, 358.)

In the North Carolina convention, James Iredell, afterwards a Justice of this Court, who was the champion of the Federal Constitution, in that body, to meet the objections of its opponents, moved a series of six amendments, of which the fourth was:

"The Congress shall not alter, modify or interfere in the times, places or manner of holding elections for Senators and Representatives, or either of them, except when the Legislature of any State shall neglect, refuse or be disabled, by invasion or rebellion, to prescribe the same."

His amendments were voted down; and the convention declined either to ratify or reject the Constitution. (4 Elliott, 245.)

In Maryland, the convention refused to consider any amendments; but the following was proposed by William Paca, and supported by Samuel Chase, afterwards a Justice of this Court:

"The Congress shall have no power to alter or change the time, place or manner of holding elections for Senators and Representatives, unless a State shall neglect to make regulations, or to execute its regulations, or shall be prevented by invasion or rebellion; in which cases only, Congress may interfere until the cause be removed." (2 Elliott, 512.)

In the Virginia convention, "Mr. Monroe wished to know why Congress had an ultimate control over the time, place and manner of election of Representatives, and the time and manner of that of Senators."

"Mr. Madison said that if Congress could fix the place of electing Senators, it might compel the State Legislatures to elect them in a different place from that of their usual sessions, which might be inconvenient. But it was necessary to give the General Government a control over the time and manner of choosing the Senators, to prevent its own dissolution.

"As to the other point, it was thought that the regulation of time, place and manner of electing the Representatives should be uniform throughout the Continent.

"Some States might regulate elections on the principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust. * * * It was found necessary to leave the regulation of these, in the first place, to the State Governments, as being best acquainted with the situation of the people, subject to the control of the General Government, in order to enable it to produce uniformity and to prevent its own dissolution. * * But if they were regulated properly by the State Governments, the

congressional control will probably never be exercised. The power appears to me satisfactory, and as unlikely to be abused as any part of the Constitution." (3 Elliott, 344.)

This assurance appears to have been satisfactory, but the convention, nevertheless, proposed the following as the sixteenth of the amendments. "That Congress shall not alter, modify or interfere in the times, places or manner of holding elections for Senators and Representatives, or either of them, except where the Legislature of any State shall neglect, refuse, or be disabled by invasion or rebellion, to prescribe the same," and then declared "that the convention do, in the name and behalf of the people of this Commonwealth, enjoin it upon their representatives in Congress to exert all their influence, and use all reasonable and legal methods to obtain a ratification of the foregoing alterations and provisions, in the manner provided by the fifth article of the said Constitution; and in all Congressional laws to be passed, in the meantime, to conform to the spirit of these amendments as far as the said Constitution will admit." (3 Elliott, 596.)

In the Pennsylvania convention, James Wilson, afterwards a Justice of this Court, explained the clause thus:

"Without this clause it (the Federal Government) would not possess self-preserving power. By this clause the times, places and manner of holding elections shall be prescribed in each State by the Legislature thereof. I think it highly proper that the Federal Government should throw the exercise of this power into the hands of the State Legislatures, but not that it should be placed there entirely without control.

"If the Congress had it not in their power to make regulations, what might be the consequences? Some States might make no regulations at all on the subject; and shall the existence of the House of Representatives—the immediate representation of the people in Congress—depend on the will and pleasure of the State Governments. * The State Governments may make improper regulations. * * But there is an additional reason still that shews the necessity of this provisionary clause. The members of the Senate are elected by the State Legislatures. If those Legislatures possessed, uncontrolled, the power of prescribing the times, places and manner of electing members of the House of Representatives,

the members of one branch of the General Legislature would be the tenants at will of the electors of the other branch; and the General Government would be prostrate at the mercy of the Legislatures of the several States." (2 Elliott 413.)

The ratification of the Constitution by Pennsylvania, without amendment, on December 12, 1787, proved so unsatisfactory to the people that a State meeting or convention was called, and met at Harrisburgh on September 3, 1788, which applied to the Legislature to ask Congress to propose this amendment:

"The Congress shall not have power to make or alter regulations concerning the time, place and manner of electing Senators and Representatives, except in case of neglect or refusal by the States to make regulations for that purpose; and then only for such time as such neglect or refusal shall continue." (2 Elliott, 503.)

Thus Massachusetts, New Hampshire, Rhode Island, New York, Pennsylvania, Maryland, Virginia, North Carolina, and South Carolina each either proposed such amendments to the Constitution as would define this power in Congress to be only alternative, after the State had neglected, refused or been disabled from executing it, or show by the record of their debates, that such was the agreement or understanding of its friends and supporters. They are the only conventions whose proceedings were reported and are known.

Connecticut, New Jersey, Delaware and Georgia all ratified the Constitution without amendment, with what explanations and understanding cannot be known, for none of their proceedings were preserved.

In the first Congress that met after the final ratification of the Constitution, elected, organized and acting under it, immediate steps were taken to propose amendments, so generally demanded by the people of the several States.

Various amendments were proposed and considered in committee of the whole, and seventeen were agreed to and reported to the House.

On August 20th, 1789, the House agreed to this report, when it was moved to add to the others the following article :

" Congress shall not alter, modify or interfere with the times, places and manners of holding elections of Senators and Representatives, except when any State shall refuse, or neglect, or be unable by invasion or rebellion to make such election"—which was lost, ayes 23, nays 28.

These amendments being considered by the Senate, it was moved on September 7th, 1789, that this amendment be added to them :

" That Congress shall not exercise the powers vested in them by the 4th section of the 1st article of the Constitution but in cases where a State shall neglect or refuse to make regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress, agreeably to the Constitution "—which was lost.

On the 8th September, 1789, in the Senate, it was moved to add the article :

" That Congress shall not alter, modify or interfere in the times, places or manner of holding elections for Senators and Representatives, or either of them, except when the Legislature of any State shall neglect, or refuse, or be disabled by invasion or rebellion to prescribe the same—which was lost." (History of Congress, 159-167.)

It appears from these amendments, proposed by and rejected in State conventions, and in Congress, from the objections of its opponents and the explanations of its friends, that the object and meaning of this clause was that Congress should only interfere when States neglected or were disabled from performing their duty.

It is clear that Congress was intended to act instead of the *States*. Federal action was to supersede *State* action. Some contended that it should only intervene when *State* action was wanting ; some when *States* acted improperly ; some when *States* were disabled. But every one agreed that *State* action ought to be superseded in certain contingencies. It was, as Wilson of Pennsylvania said, to prevent the States destroying or controlling the Congress. The State

Legislatures have the absolute and sole right to elect Senators. If the State Legislatures had the same absolute and sole right to provide for the election of members of Congress, then the State Legislatures could control Congress. It was to check this that Congress was vested with the power to supersede State action. But it is nowhere intimated that State provisions and Congressional regulations shall remain in force at the same time. It is always admitted that Congress can supersede State provisions, but no one ever intimated that Congress could leave State regulations in full force and attempt to control State officers executing them.

It is clear, from this contemporaneous record and construction, that the spirit and intent of the Constitution is, that the power cannot be exercised by Congress unless States refuse, neglect or are disabled from executing it. This was the construction placed on it in debate and in amendments, proposed by the friends of the Constitution in the several State conventions. They insisted that amendments were unnecessary, and agreed to propose them only "to remove the fears and quiet the apprehensions of many of the good people of this commonwealth"—in the language of Massachusetts, in proposing them. And when the Constitution was ratified and put in operation, the men who had promoted, framed, supported and secured the ratification of it, were, in the main, entrusted with the duty of putting it in operation.

Ellsworth, Jay, Rutledge, Samuel Chase, Wilson, Iredell, Blair, Johnson and Patterson were selected to exercise the judicial power of the new government.

The President of the Federal convention was made the President of the Federal Union.

The Congress was under the entire and absolute control of the friends and advocates of the changed system. They had all insisted that the amendments were unnecessary, for, by the assurances of Wilson, Madison and Hamilton, and others like them, the people had been satisfied that the

power of regulating elections by the Congress never could be, nor would be, exercised, until after the contingency of neglect, refusal or disability of the States to exert it. Therefore they declined to amend the Constitution in the manner proposed in the first Congress, in accordance with the amendments asked for by Massachusetts, Virginia, New York, New Hampshire and South Carolina, because such amendment was useless and superrogatory.

It seems clear that it was the intent to vest the Congress with the discretion as to where this power should be exercised, but it is equally clear that it was also the intent that this discretion could not rightfully, and according to the delegation of the power, be exercised except in the contingencies referred to.

It is beyond discussion, that this clause makes it the duty of the States to prescribe the time, place and manner, and that this duty was thus imposed because a State might claim that her representation in Congress was voluntary, as was the case of Rhode Island. This clause was intended to make her attendance and representation in Congress obligatory.

I.

And the clause further gives the Congress the power *at any time* to make or alter such regulation as it makes itself, or the States have made.

The power of the Congress is alternative with the power of the States; and when the power of the former is exerted, of course it is paramount to the power of the latter.

But althongh the Congress "may at any time" make or alter such regulations, and its discretion *when* it will so do, is beyond review of the judicial power, the regulations, when made, must be consistent with the general spirit of the two governments, and with the Constitution, by virtue of which they are made.

It may be true that Congress is the sole judge as *to when* the contingency has arisen in which it is proper to exercise the power, but the exercise thereof is, nevertheless, subject to the Constitution, and the review of this Court.

Congress has the power to regulate commerce, but it cannot, in regulating it, give a man a right to sell spirituous liquors in a State which forbids such sale; to establish uniform rules of naturalization and on the subject of bankruptcy; but it certainly could not made a law requiring aliens to be naturalized before the judges of the Courts of last resort of the States, and impose penalties on the judges for fraudulent execution of the law. Nor could it make State Sheriffs, executors of a bankrupt system, and punish them for disobedience to its provisions

So, likewise, the Congress can make regulation of the *manner of holding* elections; but if it were to require that *the manner of holding* should be by the Governor of a State, assisted by the Judges of all the Courts, who should proceed from place to place, and hold the elections at the times and places specified, in order to secure a fair election, everybody would admit that such a regulation would be void; because, as this Court says in The Collector vs. Day, 11 Wallace, 127, "any Government whose means employed in conducting its operations, if subject to the control of another and distinct Government, can exist only at the mercy of that Government."

It can regulate the value of money, but it cannot make a pound of silver equal to a pound of gold in the payment of debts.

To fix the standard of weights and measures, but it would be an unconstitutional exercise of power to declare by law that an inch should be considered as long as a yard.

And for the same reason, rules made for the government and regulation of the land and naval forces, and for organizing the militia, which swept into the ranks by conscription all the officers of the State Governments—Executive and Legislative, would be void.

And if the Congress, in the attempted exercise of the power "to regulate the manner of holding the elections," were to enact laws to regulate "the manner of electing," such laws would be void.

If it were to enact that at the election for Representatives it should require a unanimous vote to elect, or eighty per cent. of the vote; or that the person receiving the smallest number of votes should be elected; or that a person should receive an actual majority of all persons qualified to vote, and ascertain by law that the number of qualified voters amounted to twenty per cent. of the entire population, then, in each one of these cases, such regulation would be void—first, because they would be regulations of the *manner of electing*, and not regulations of the *manner of holding the elections;* and second, because such regulations would be contrary and repugnant to the whole spirit of our institutions, which require an election to be decided by the voters actually voting. Therefore, it is clear that while the Congress is sole judge as to the time of making the regulations by law, still the regulations, when made, must be consistent with the Constitution. The discretion is given as to the *time* of exercising the power; the *manner* of exercising it is controlled by the supreme law and the judicial power, and would be adjudged void by common consent as well as by the decisions of this Court.

Therefore, while the Congress "may at any time make regulations," it cannot at any time make *any* regulations. The regulations it does make must be consistent with the intent and meaning of the Constitution in all its parts and in every provision.

We have already seen that this is a system of co-ordinate Governments with co-ordinate departments; that the main object of their organization was to preserve the liberties of the people; and that the means devised and applied through them was a distinct separation and division of powers between the two Governments and between their different departments; and that any action by either Government or either

department, which, of necessity, produced collision between the two Governments or any two of their departments, was contrary to the whole scheme, object and intent of the governmental organization, and therefore void.

II.

We will now consider the fourth section of the first article of the Constitution.

This section is mandatory on the States. It says:

"The times, places and manner of holding elections for Senators and Representatives *shall* be prescribed in each State by the Legislature thereof."

They "*shall be prescribed*," because the reason of the thing and the example of Rhode Island had proved the necessity of requiring this duty to be performed by the States. It was made binding. It was imposed as a duty, not left to their mere will and pleasure. It does not confer a right; it commands the performance of an obligation.

As in the second section of article first, "the actual enumeration (of population by Congress) *shall be made* within three years after the first meeting by Congress, and within every subsequent term of ten years."

"When vacancies happen in the representation from any State, the Executive thereof *shall issue* writs of election to fill such vacancies."

In section 5: "Each House *shall keep* a journal of its proceedings."

In article 2, section 1: "Each State *shall appoint*, in such manner as the Legislature thereof may direct, a number of electors, &c."

In article 4, section 1: "Full faith and credit *shall be* given in each State to the public acts, records and judicial proceedings of every other State. Any person charged with treason, felony or other crime, who shall flee, &c., *shall be delivered up*. Persons held to service or labor in one State, escaping to another, *shall be delivered up*."

All these clauses create duties and impose obligations; most of them make no provision for the case of a refusal to perform them.

If the Congress *does not* provide for making the enumeration every ten years; if the Executive of a State *does not* issue writs to fill vacancies in the representation of his State; if each House *does not* keep a journal of its proceedings; if each State *does not* appoint electors in such manner as the Legislature thereof may direct; if a person charged with treason or felony *is not* delivered up by the Executive of the State in which he may be found, no provision is made in the Constitution for enforcing the obligation.

When States do not give full faith and credit to the public acts of other States, the Federal judiciary compels obedience to that mandate; and Congress has supplied the means by which the constitutional obligation with regard to fugitive slaves might be enforced.

But as to the duties required to be performed by the States, viz: to prescribe the times, places and manner of holding elections; for the Executive of a State to issue writs of election to fill vacancies, and to appoint electors, the Constitution supplies no means of compelling States to perform it in case they neglect or refuse so to do. The law made by the Constitution for States as States is without sanction.

But as to the duty of prescribing time, place and manner of holding elections, full discretion is given also to the Congress to do the same thing; and thus, while no means are supplied for compelling the States to perform the obligation imposed on them, ample provision is made for having that thing done by Congress in case of their default.

The thing to be done is to prescribe the manner of holding the elections.

To prescribe—to write down; to arrange by rule; to direct beforehand—the manner of holding.

"The manner of holding" is the method by which and the instruments which are provided by law for holding the elections. It is the act of receiving, registering, keeping, counting, ascertaining and declaring the result of the votes

received, registered, kept, counted, ascertained and declared. It is the arrangement of circumstances under which the elections are held. The meaning of the words "manner of holding the election" is defined in the Constitution, article II, section 1, where the manner of holding the election for President and Vice-President is provided for.

"The manner of holding the election" is a thing or an action. Time, place and manner adhere to, appertain to and co-exist with this thing or action; for time, place and manner are the necessary accompaniments, ingredients and parts of every thing and every action. An action or a thing must have time, place and manner surrounding, identified and co-existent with it. It cannot be without time, place and manner of being; it cannot be done without time, place and manner of doing; and, therefore, time, place and manner must pertain to and, as it were, form a part of every "holding of every election"

The States are to prescribe therefor—

1st. The time of holding the election.

2d. The place of holding the election.

3d. The manner of holding the election.

The power then given to the States, and duty imposed upon them by this section, is over the circumstances of time, place and manner. These they are bound to prescribe.

III.

The second clause of the section confers the power on the Congress. It imposes no duty, nor creates an obligation, as the first clause does on the States; but it creates in the Congress the right, power and privilege to interfere and set aside the time, place and manner prescribed by the States, and make new regulations, or alter the old ones, concerning the same.

The language of the clause is: "*But* the Congress *may*, AT ANY TIME, BY LAW, make or alter such regulations, except as to the place of choosing Senators."

This clause gives the Congress the right—

1st. At any time in its discretion.

2d. By law, by a fixed rule, prescribed beforehand, made by the Congress, subject alone to its control; to be altered, amended and modified solely by the Congress.

3d. To make regulations of the times of holding elections.

4th. To make regulations of the places of holding elections.

5th. To make regulations of the manner of holding elections.

6th. Or to alter such regulations of these circumstances as have been prescribed by the States.

The time at which the Congress may exercise the power is "any time;" it is in the discretion of the Congress. But the power must be exercised by *law;* by a rule of action prescribed beforehand. Congress could not delegate the power to the President to make regulations; nor to the Judges of the Supreme Court; nor to a commission appointed by itself; nor to the Governor of a State; nor to the Legislatures of the States. It must be exercised by itself, by its own law, which law must be subject to its supervision or alteration alone.

The *law* by which it is thus executed must, of necessity, be subject to the inspection, of and comparison by this Court, with the supreme law—the Constitution of the United States. And the Congress may thus make or alter such regulations of the time, place and manner "of holding the elections."

Now, where the power of the Congress and the States may, at the same time, be applied to the same subject, the power of the Congress being paramount, at once excludes the exercise of the State power.

The regulations, therefore, to be made by the Congress must be—

1st. By their own law.

2d. By excluding the State power from all operation on the subject regulated.

3d. They must be consistent with the intent and object of the two Governments, and not produce collision.

4th. They must be enforced, by the power of the Congress, by officers of its own creation, executing laws of its own enactment.

IV.

The sections of the Revised Statutes under consideration do not comply with these requisite conditions, because—

1. The regulations enacted adopt the regulations already provided by the States; adopt the State laws and the State officers as the laws and officers of the Congress, and seek to compel them to execute the same by the Federal power; and are not such regulations as Congress may make. They are regulations of the regulations of the manner of holding the elections prescribed by the States. They do not regulate the manner of holding the election, but they regulate the State regulations. They create Supervisors and Special Deputy Marshals, and charge them with the duty of "guarding and scrutinizing" "the manner of holding the elections" prescribed by the States. They denounce punishments against State officers for disobeying State laws; and further than that, actually create a new crime "of doing acts not authorized by the laws of any State, or of the United States, with the intent to influence the elections." The language of the Statute is—

"Section 5515: Every officer of an election at which any Representative in Congcess is voted for, whether such officer of election be appointed or created by, or under any law or authority of the United States, or by or under any State, territorial or municipal law or authority, who neglects or refuses to perform any duty in regard to such election, required of him by any law of the United States, or of any State or Territory thereof; or who violates any duty so imposed; or who

knowingly does any acts thereby unauthorized, with intent to affect any such election or the result thereof."

Therefore, this is not a regulation of the manner of holding the elections, prescribed by a law of the Congress; but it is an attempt to enforce, to scrutinize, to guard and to apply the regulations of the manner of holding the election prescribed by the Legislatures of the States. It is not an execution of the Federal power as granted.

2d. The regulations made by Congress in the Revised Statutes, are not the "regulations to be made by law," authorized and required by the Constitution.

The regulations of the manner of holding the elections required by the Constitution must be made by law. Now law is a rule of action, operating equally at all times, in every place, on all persons, under the same conditions.

The regulations made by Congress profess to adopt the election laws of the States, and thereby make them *pro hac* Federal laws, as if they had been re-enacted *totidem verbis*

It is undoubtedly competent for Congress to adopt, by Statute, a complete Code or separate enactments of laws. They have done so in the act regulating practice in the Circuit Courts of the United States, and in providing for the enforcement of State Pilot and Quarantine Laws. But this was done in the exercise of implied powers to pass all laws necessary and proper, to enforce the judicial power vested in the United States, and necessary and proper to regulate commerce.

It is clear that a power to make regulations by law can not be exercised by adopting the systems of thirty-eight States, and of hundreds and thousands of cities and counties in States on this subject.

Now the regulations made by this law, of the manner of holding elections, adopt the laws of each State, city, town or county.

The same act may be punished in Virginia, and may be lawful in New York. The law of Ohio may forbid certain

things, and the law of Massachusetts may permit the same things; and the citizen of New York may be imprisoned under this Statute and be committed to the custody of a citizen of Massachusetts, who openly, avowedly and meritoriously does the same thing.

This cannot be such law as is required by the Constitution and the spirit of all law. What is forbidden in one place must be forbidden in all. What is criminal in one must be criminal in all, just as punishment must be the same everywhere. A law declaring crimes and punishments must declare the same things crimes, and denounce the same punishments everywhere on every person for the same things. Otherwise it is not law.

And if the Federal Statute be construed to adopt the election laws of every State, and the regulations of every county, city and town in every State, it must follow that it has adopted them as they existed at the date of its passage, to wit: as on the 31st of May, 1870.

The whole body of State, Territorial and municipal laws, as it existed on that day, thereby became the laws of the United States.

Whenever such States, Territories and municipalities have since that day repealed, altered or amended their election laws, then the Federal Statute, by adoption, still remains the Federal law; but the new State or municipal law is the one that is in operation, and the machinery of Supervisors and Special Deputy Marshals provided by the regulations made by the Federal laws, do not apply to these new State or municipal laws.

Hence it would follow, that these regulations made by law of the Congress, of the manner of holding the elections, are at the mercy of every State or municipality. They need only repeal all these old election laws and enact new ones, when the Federal law will have no machinery to enforce it, and fails.

It cannot be that such an exercise of Federal power could ever have been contemplated by the Constitution—the making of regulations that could be rendered inoperative at the will of each State, so far as elections held therein are concerned.

When the Congress has adopted State laws as the laws regulating practice, which it intended should be enforced, it has provided its own officers to enforce it. In other cases, as in the Pilot and Quarantine law, it has left State officers to execute them, uninterrupted by Congress.

3. The regulations made cannot adopt State officers and make them Federal officers, and, therefore, are without machinery to enforce them.

If it be considered that these regulations operate as an adoption of State election laws, they cannot operate as an adoption of State election officers.

A. The State officers are appointed by the State, paid by the State, and responsible to the State. She can abolish their officers, expel them from office, and appoint new officers in their place.

It is impossible that Federal officers can exist who can thus be created or destroyed at the pleasure of another government.

B. The Constitution, article 2, section 2, provides that the President shall, with the advice and consent of the Senate, appoint all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the Courts of law, or in the heads of departments.

State election officers are appointed by none of these authorities, and cannot, therefore, be Federal officers. It is clear, therefore, that these regulations made by Congress

may at any time be paralyzed by the States, by repealing their election laws, or by changing their election officers, which would then be neither the laws nor the officers adopted by the Congress.

While the sole and entire object of vesting the power in Congress, to make regulations by law of the manner of holding, &c., was to prevent State interference, and provide for the execution of it, secure from the State power—these regulations, which are entirely subservent to the States, are not a constitutional execution of the power.

4. The regulations cannot be executed without collision with State authorities, and, of necessity, require an intermingling of Federal and State functions, and is, therefore, unconstitutional.

They punish by fine and imprisonment, one or both, every offense punished by the laws of the States, thus putting each man twice in jeopardy.

They require State officers to do things prohibited by State laws; as, for instance, they require the State judges to allow the Supervisors and Special Deputy Marshals to be present in the polling places, and when the votes are counted; when State laws make special provisions for proper parties to be present, and prohibit the presence of all others.

V.

We will re-state these propositions, and the argument to establish them.

First.

1. The regulations made must be by *law of Congress.*

2. Such law must not produce collision or intermeddling with State laws.

3. Therefore, it must control and provide for the whole subject "of the manner of holding the elections."

Second.

1. The regulations must not be subject to be altered, amended or modified by the States.

2. Therefore they must adopt the State laws in force, and State officers provided for by those laws at the date Congress makes the regulations by law; or they must not adopt them.

3. If they adopt them, and the States afterwards repeal or alter the State law, the old law adopted and made part of the law of Congress remains in force; but it does not apply to the new regulations and officers presented by the States, and is left with nothing to operate with or upon. Hence it is subjected to the will and pleasure of the States, and is not the regulation authorized to be made by laws of Congress.

4. If they do adopt the State laws then in force, and thereafter to be enacted by the States, such adoption is void as to future laws.

a. Because it is a delegation of the legislative power committed to the Congress.

"One of the settled maxims of Constitutional law is that the power to make laws cannot be delegated by that department to any other body or authority. When the Sovereign power of the State has located that authority there, it must remain, and by the Constitutional agency alone must the laws be made."

Cooley on Const. Lim. 117.

In Martin vs. Hunter it is held, that no part of the judicial power of the United States can be conferred upon State officers—*a fortiori* is it that no part of the legislative power of the United States can be delegated to the State officers.

The power is "to make regulations by law."

It is not like the power to regulate commerce.

In the latter case Congress may provide by law for making regulations. It does so in authorizing the Secretary of the Treasury to make regulations, and in adopting the Pilot laws of the States by the Act of 1789, which enacts that pilots shall continue to be regulated in conformity with the existing laws of the States respectively, wherein such pilots may be, or with such laws as the States may respectively enact for that purpose.—section 4235.

Hobart vs. Drogan, 10 Peters, 121.
Cooley vs. Board of Wardens, 12 How. 299.
Ex parte McNeil, 13 Wall. 236.
License cases, 5 How. 580.

So as to Quarantine laws, adopted by section 4792, which declares that the quarantines and other restraints established by the health laws of any State * * shall be duly observed by the officers of the customs revenues of the United States, &c., and all such officers of the United States shall faithfully aid the execution of such quarantines and health laws, according to their respective powers, * * and as they shall be directed from time to time by the Secretary of the Treasury.

This is construed as an adoption of laws established, or to be established, by long custom.

Passenger cases, 7 How. 406.

The power in the one case is to make regulations by law. There the regulations must be in the law itself. In the other, it is to provide by law for making regulations. In such case, the law sets out the manner in which, and by whom they shall be made.

b. Because it subjects the regulations made by law of Congress to be controlled by the legislation of the State.

The regulations made by law of Congress are the supreme laws, and to subject them to the control of the State is contrary to reason.

"That there is a plain repugnance in conferring on one government a power to control the Constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, is a proposition not to be denied."

McCulloch vs. Maryland, 4 Wheat. 431.

5. If, however, the Congressional regulations do not adopt State laws *in esse* or *in posse*, but are intended to enforce State laws, then again they are void, because they leave the whole matter to be altered by the States as they please.

The States can make an act a crime one year and declare it lawful the next; or one State may make that lawful, which another punishes as criminal.

But no regulations made by law of Congress can punish in one State, an act which it considers lawful, and, therefore, protects in another; or punish at one time, an act which it protects at another, in the same place.

The cases under examination offer a perfect illustration of these propositions.

The laws of the United States, providing for the appointment of Supervisors of Elections and Special Deputy Marshals, defining their duties, and imposing penalties on all persons for interfering with them, were passed May 31st, 1870, and February 28th, 1871.

They applied to the Registration of voters and to Officers of Registration and of Elections, provided for, by the laws of Maryland, *then in force*.

But the Registration laws of Maryland were repealed by the Act of 1874, chapter 490, passed April 10th, 1874.

"Section 1. That an act passed January session, 1870, relating to Registration of Voters, be and the same is hereby repealed, and re-enacted as follows, &c."

And the Judges of Election provided for the city of Baltimore by the Maryland law in force 1870 and 1871, have all since been removed, their offices abolished, and new ones created and appointed under a new law by a different appointing power. The new Judges thus created have different qualifications and requisites.

Prior to 1876 the Judges of Election in the city of Baltimore were appointed by the Board of Police, a body elected by the Legislature.

In 1876, chapter 223, passed April 3d, 1876, (page 357), an act was passed repealing those sections of the Code of Public Local Laws of Maryland which thus provided for the appointment of these Judges, and created instead a Board of Supervisors of Elections for the city of Baltimore, to be appointed by the Governor, who shall appoint the Judges of Election for each election precinct of said city, "*one of whom shall be of a political party different from that with which the other two are connected.*"

Therefore, the Officers of Registration and of Election, and the mode and manner of registration operating in Maryland in November, 1878, were not the officers and the modes adopted by the Acts of Congress. They were different modes and different officers. They were not the modes nor the officers, the Supervisors and Special Deputy Marshals were directed "to scrutinize and to guard." And these petitioners not being the Judges of Election referred to in the Acts of 1870 and 1871, and to whom those laws apply, must be released, because the Court which convicted them had no jurisdiction of the subject-matter.

If, on the other hand, it is intended that the regulutions made by law of Congress shall apply to this new method of regulation, and to these new judges, then the regulations made by Congress have been changed and controlled by the State of Maryland. And the spectacle, in fact, will be presented, foretold by the General Court of Virginia, through

the President, Judge White, and quoted in U. S. vs. Lathrop, 17 Johnson, 23.

"When the criminal laws of each of the States are enforced by the Federal Judiciary, then, say the Court, a system of a strange kind of mosaic work in the judiciary of nations will arise. Here a Cadi sitting in judgment upon an Italian denying the Pope's infallibility; there the stern fathers of the Holy Inquisition, putting a poor Turk to the rack because he denies that Mahomet is the Prophet of God; the Judges of republican Virginia pillorying an Englishman for libelling royalty; and the Court of King's Bench inflicting the same punishment upon an American for libelling the government of the United States for the late declaration of war."

So the strange spectacle will be presented of the Chief Justice of this Court, sentencing a person in Maryland, for recording a *viva voca* vote; the next week, inflicting the same punishment on another in Virginia, for receiving and counting a ballot; the very next week, sending Judges of Election to prison in North Carolina for opening the voter's ballot as he hands it to them; and the week after, inflicting the same punishment on Election Judges in South Carolina for failing to open such ballot.

And the anomaly of the proceeding will be greater, when two years after, on returning to his circuit, the same eminent functionary shall find every thing reversed by the action of the States. This time he will have to punish the judge in Maryland for acts that were innocent before, and to acquit that one in Virginia for acts which he had punished before.

It is respectfully submitted, that an Act of Congress, from which such extraordinary and astonishing consequences flow, is not the "regulation made by law of the manner of holding the election for Representatives in Congress," authorized to be made by the Constitution.

VI.

THE ACT OF CONGRESS IMPOSES ON THE CIRCUIT COURTS DUTIES NOT JUDICIAL, AND IS, THEREFORE, IN THAT RESPECT, VOID.

Section 2011 of the Revised Statutes provides, that whenever an election, or registration of voters for an election at which a Representative in Congress is to be voted for, is about to take place in any county, city or town, upon the statement in writing of a certain number of citizens, to the Judge of the Circuit Court of the United States, for the circuit wherein such county, &c., is situated, if these desire to have such election both guarded and scrutinized, the Judge shall open the Circuit Court in the most convenient point in the circuit.

Section 2012. The Court, when so opened by the Judge, shall proceed to appoint and commission from day to day, and from time to time, and under the hand of the Judge, and under the seal of the Court, certain officers, who shall be known and designated as Supervisors of Election.

Section 2013. The Circuit Court, when opened by the Judge as required, shall be open from day to day, and be always open for the transaction of business under this title; and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time; and a Judge setting in chambers shall have the same powers and jurisdiction—including the power of keeping order and of *punishing for any contempt* of his authority—as when sitting in Court.

Sections 2014 and 2015 authorize the Judge of the Circuit Court, when unable to perform any duties herein imposed, to designate any District Judge in his circuit, to perform them as fully as he could have done.

Section 2025 directs the Circuit Courts to appoint, from among the Circuit Court Commissioners of each Judicial District in each Judicial Circuit, one who shall be known as the Chief of Supervisors of Election of such district.

These Supervisors thus appointed are required by section 2016 to attend the registrations of voters; to challenge any person offering to register; to scrutinize such registry, and to affix their names to each page thereof in such manner as will, in their judgment, detect and expose fraud.

Section 2017. They are required to attend all elections for members of Congress, and to challenge any voter whose legal qualifications they doubt, and to remain until every vote is counted.

By section 2018, they must scrutinize and count each ballot cast; and forward returns and certificates to the Chief Supervisor, with their opinion of the truth and fairness of the election.

By section 2019, they are required to see each person offering to register and to vote.

A. The functions thus entrusted to these officers are not judicial, nor are they ministerial in the discharge of judicial functions. The judicial power of the United States extends only to the particulars enumerated in the Constitution. The power to appoint such officers is not one of them.

The Constitution, article 12, section 2, declares that the President shall nominate, and by and with the advice and consent of the Senate, shall appoint all other officers whose appointments are not herein provided for, and which shall be established by law; but Congress may, by law, vest the appointment of such inferior officers, as they think proper, in the President alone, *in the Courts of law*, or in the heads of departments. These inferior officers "*must be appointed by the department of government to which the officer to be appointed most appropriately belongs. The appointment of Clerks of Courts properly belongs to Courts of law, and a Clerk is one of the inferior officers contemplated in this provision.*"

Ex parte Hennen, 13 Peters, 258.

B. The functions directed to be performed by the Circuit Courts are not judicial functions and cannot be imposed on the Courts, because thereby a confusion between the executive and judicial departments of government is produced.

The judicial power of the United States extends only to "cases and to controversies."

"A case in law or equity consists of the right of one party as well as the other, and it may be truly said to arise under the Constitution or a law of the United States, whenever its correct decision depends on the construction of either."

Cohen vs. Virginia, 6 Wheat. 377.

"A controversy," in the sense of the Constitution, embraces a wider field than "cases," for it includes discussions, which before the Constitution were political only, but by the Constitution were subjected to the judicial power—as controversies between States as to boundary;

Rhode Island vs. Massachusetts, 12 Peters, 657;

or controversies as to acts of States, affecting the rights of citizens of neighboring States.

South Carolina vs. Georgia, 93 U. S. 14.

"'A case' or 'controversy' involves the idea of a party prosecuting in a Court, to establish or maintain some right or enforce some duty against another party."

Pomeroy Const. Law, section 150.

And this judicial power *shall be vested* in Courts.

Constitution, article III, section 1.

No other powers, functions or duties can be imposed on Courts or judges, except judicial powers, functions or duties, else the separation between the departments of government is destroyed.

This question came up at an early date for decision and action by the Federal Judiciary; of which a full account is given in Hayburn's Case, 2 Dall. 409, in the note thereto.

Congress passed a law, March 23, 1792, requiring the Circuit Courts to examine into the claims of parties, claiming Revolutionary pensions. The Judges of the Circuit Courts all declined to perform those duties, because they were not judicial. They were James Wilson, of Pennsylvania; John Blair, of Virginia; James Iredell, of North Carolina; John Jay, Chief Justice, of New York, and William Cushing, of Massachusetts—all of whom had been members of the Convention which framed the Constitution, and all of whom were Justices of this Court. They comprised the whole Court, for Mr. Justice Johnson, of Maryland, was not qualified in this Court until August Term, 1792, although his commission was dated November 7, 1791

They unanimously declined to perform the duty imposed upon them.

"1. *Because the business directed by this Act is not of a judicial nature. It forms no part of the power vested by the Constitution of the United States.*

2. *That by the Constitution the Government of the United States is divided into three distinct and independent branches, and it is the duty of each to abstain from and to oppose encroachments on either.*

3. *That neither the legislative nor the executive branches can constitutionally assign to the judicial, any duties but such as are properly judicial, and to be performed in a judicial manner.*"

Letters of the Justices to the President.
Note to Hayburn's Case, 2 Dall. 409.

The Attorney General, Edmund Randolph, the author of the Virginia plan in the Convention, applied to the Supreme Court for a mandamus, to be directed to the Circuit Court of the United States, for the District of Pennsylvania, commanding that Court to proceed with the petition of Hayburn, who had applied to be put on the pension lists of the United States. The Court held the matter *sub curia*, and

the Act of Congress was repealed; but to set the matter at rest, a case was made up in the Supreme Court, to recover back money paid to a pensioner under the certificate of the Judges of the New York Circuit, who had, at first, acted under the law, in a few cases.

A suit was brought by the United States, to recover back the sum of $179.06, paid a person on the certificate.

To the Court had then been added William Patterson, of New Jersey, the author of the Jersey plan in the Convention, and the Court unanimously decided that the power proposed to be conferred by the Act of Congress was not judicial power in the meaning of the Constitution, and was, therefore, unconstitutional, and could not be lawfully exercised by the Courts.

See note to Ferreira's case, 13 Howard, 53, prepared and reported by order of Chief Justice Taney.

The Court in that case held "that an Act of Congress of 1849, authorizing the District Judge for the District of Florida, to hear and adjudicate on claims for injuries suffered by the inhabitants of Florida, by the American army in 1812; which claims thus certified were to be paid, if the Secretary of War should deem them just, was a void act because the duties to be performed are entirely alien to the legitimate functions of a judge in a Court of justice."

See also, Murray vs. Hoboken Land Co., 18 Howard, 27.

Ex parte Vallandingham, 1 Wall., 253.

114. Mass.

It seems clear, therefore, that the creation of Supervisors of Elections is unauthorized and void, and they have no legal existence or power.

VII.

THE ACT OF CONGRESS IMPOSES DUTIES ON THE SPECIAL DEPUTY MARSHALS WHICH ARE BEYOND THE POWER OF THE UNITED STATES TO CONFER, AND IS THEREFORE VOID.

By section 2021, they shall assist the Supervisors appointed by the Judge in the verification of the list of persons who have registered and voted, and to attend all times and places of registration and voting.

By section 2022, they shall protect the Supervisors; shall preserve order at the polls, and at places of registration, and arrest, with or without process any person who commits or atttempts to commit any of the acts prohibited herein, i. e., to interfere with the Supervisors.

By section 2024, the Marshal and his deputies are empowered to summon the *posse comitatus.*

In these sections the Marshal and his deputies, therefore, are required to assist and protect the Supervisors, and to keep the peace at polls. As it has been shown that the Supervisors have no legal existence, no legal protection can be required for them.

The only duty left the Marshals is to keep the peace and to summon the *posse comitatus.*

This Court has so often, so lately, and so clearly declared, that the duty of preserving order in society, of protecting life, liberty and property in society, of regulating and taking care of society in all its domestic affairs, was reserved to, assumed by and still inheres in the States, that no authority will be cited for the proposition.

Every Chief Justice of this Court has laid it down in succession, but by none with more force than by the present Chief Justice, who declares in Cruikshank's case that "*Sovereignty for this purpose rests alone with the States.*"

And it cannot be that when the right, duty and obligation of preserving peace and order rests alone with the States, another authority can intervene, expel the State authority, arrest the State officers, and assume to the very thing, which the States alone can do.

VIII.

THE ACT OF CONGRESS PROPOSES TO OPERATE ON OFFICERS OR PERSONS, AUTHORIZED AND REQUIRED BY STATE LAWS, TO PERFORM CERTAIN DUTIES UNDER THEM. AND TO REQUIRE THEM TO DISOBEY AND DISREGARD STATE LAWS, WHEN THEY COME IN CONFLICT WITH THE ACT OF CONGRESS. IT THEREBY OF NECESSITY PRODUCES COLLISION, AND IS THEREFORE VOID.

By sections 5515 and 5522 of the Act, every officer of an election, and every person acting under any authority of any State or municipality, who obstructs, hinders or prevents the Supervisors and Marshals in the discharge of their duties, is liable to punishment.

This provision, of necessity, brings on conflict with State laws. The case at bar is the case of Judges of election.

In another case a Governor of a State was indicted in the Circuit Court of the United States for not properly performing his duty, under the State laws. U. S. vs. Clayton, 2 Dillon, 219.

Every officer or person who commits an offence against the State law, may be punished by the State; and under the Act of Congress, may be punished a second time for the same offence. It is true the same facts may constitute an offence against both of the governments, and may be punished by each of them. They may thus constitute *two offences* against two governments.

But this Act of Congress makes one offence, to wit: the offence against the State law, punishable in the Federal Courts, when it is at the same time punishable in State Courts.

Such collision must necessarily and unavoidably occur, so long as an attempt is made to enforce State regulations of the manner of holding elections, with State machinery, by the added sanction of Congressional enactment. The proper exercise of the power requires such regulations to be made by laws as will supersede the State laws and officers, and provide all the instrumentalities by which the regulations of Congress shall be enforced.

IX.

We therefore, claim that we have established these propositions.

First.

That this is a system of co-ordinate governments, each administered by co-ordinate departments.

Second.

That the division and separation of powers, between these governments, and departments, must be preserved in all their acts.

Third.

That confusion, and intermingling, of the functions of governments, or departments, are alike prohibited.

Fourth.

That the power conferred on the Congress, by the fourth section of the first article of the Constitution, is exclusive of the power of the States, over the manner of holding the elections for Representatives, and must be so exercised as not to produce confusion and intermingling between the functions of the co-ordinate governments or co-ordinate departments.

Fifth.

That as exercised by the Congress in the Statute under review, it does not exclude the application of the power of the States, at the same time, to the subject of the manner of holding the elections, and is therefore void.

Sixth.

That as exercised by the Congress, it is subject to be controlled, altered, and modified, by the States, and is therefore void.

Seventh.

That as exercised by the Congress, it produces an intermingling of the functions of the judicial department of the Federal Government, with those of its executive department, and in that respect is void.

Eighth.

That as exercised by the Congress, it attempts to regulate the manner of *voting* at the election for Representatives, instead of regulating *by law* the mannre of *holding elections*, and is therefore void.

Ninth.

That as exercised by the Congress, it attempts to provide by law, for the making of regulations of the manner of holding the election, instead of making those regulations by law, and instead of making the regulation by its own law, delegates the power to make them to the States, and is therefore void.

BRADLEY T. JOHNSON,
JOHN P. POE,
BERNARD CARTER,
For Petitioners.

BEFORE THE

HON. MORRISON R. WAITE,

Chief Justice of the United States.

Ex parte, LEWIS COLEMAN, MARTIN C. BURN
WALTER TUCKER, HENRY BOWERS,
AND ALBERT SEIBOLD.

Judges of Election at a certain Congressional Election
the City of Baltimore and State of Maryland, who we
convicted in the Circuit Court of the United States f
the District of Maryland, under sections 5514, 5515 a
5522 of the Revised Statutes of the United States, a
who have made application for the Writ of Hab
Corpus.

BRIEF FILED IN THIS CASE BY

CHARLES J. M. GWINN,

Attorney-General of Maryland, appearing on the part of the
Petitioners by direction of the Governor of Maryland.

1879.

Murphy & Co., Printers & Stationers, 182 Baltimore street, Baltimore.

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Chief Justice of the United States.

Ex parte, LEWIS COLEMAN, MARTIN C. BURNS, WALTER TUCKER, HENRY BOWERS, AND ALBERT SEIBOLD,

Judges of Election at a certain Congressional Election in the City of Baltimore, and State of Maryland, who were convicted in the Circuit Court of the United States for the District of Maryland, under sections 5514, 5515 and 5522 of the Revised Statutes of the United States, and who have made application for the Writ of Habeas Corpus.

BRIEF FILED IN THIS CASE, ON THE PART OF THE PETITIONERS, BY DIRECTION OF THE GOVERNOR OF MARYLAND.

It is respectfully submitted that the Petitioners, in these cases, now in custody, under color of the authority of the United States, are entitled to be discharged therefrom, because sections 5514, 5515 and 5522, of the Revised Statutes of the United States, under which their convictions were obtained, are void, being contrary to the Constitution of the United States.

The Constitution of the United States provided that all the legislative powers, granted by that instrument, should be vested in a Congress of the United States, which should consist of a Senate and House of Representatives.

Art. 1, sec. 1.

It directed that the House of Representatives should be composed of members apportioned among the several States according to a prescribed standard, who should be chosen every second year by the people of such respective several States; that such members should be of a certain age, and should have been, for a prescribed period, citizens of the United States and inhabitants of the State in which they should be chosen; and that the electors in each State of the members to be thus chosen, should have "the qualifications requisite for electors of the most numerous branch of the State Legislature."

Const. U. S., Art. 1, sec. 2.

The people of each State had the exclusive power to prescribe by their constitution and laws the qualifications which the citizens of such State should possess to be entitled to be electors of the most numerous branch of its State Legislature. They had, therefore, the exclusive power to determine, by means of the constitution and laws of their State, what persons in such State should be electors for members of the House of Representatives.

As the people of each State had the exclusive power to choose the members of the House of Representatives apportioned to such State, they had the exclusive right to provide by law for the appointment of those, who should collect, examine, and announce the votes, which determined such choice.

They had the right to prescribe the times and places at which such choice should be made. This right would have been exclu-

sive, except for the reservation to Congress of the right to make its own regulations as to these particulars, or to alter those of the States.

Const. U. S., Art. 1, sec. 4.

They had the right to prescribe the regulations which those who were appointed under the laws of the respective States to collect, examine, and announce the votes for members of the House of Representatives, should observe in collecting, examining and announcing such votes; for such regulations would govern the manner of holding such elections. This was a power wholly distinct from the power to appoint the officers who should collect, examine and announce the votes. The power to appoint such officers not having been given by the Constitution to the United States, nor prohibited by it to the States, must be considered to have been wholly reserved to the States respectively, or to the people.

The regulations of the manner of holding elections for Representatives in Congress, which the Congress of the United States was authorized to make, were not intended to be punitive regulations. The power, which was intended to be conferred, was a right to establish general regulations as to the manner of holding elections. The exercise of this power by Congress, would have compelled the States to enforce such regulations by appropriate legislation. For if the regulations, made by Congress as to such particulars, had not been enforced in any State by appropriate legislation, the elections held in such States for representatives in Congress would have been invalid; and the House of Representatives, by its power of judging the election, returns and qualifications of its own members, could have excluded the representatives from the State which had neglected its constitutional duty, and have thus compelled the observance of such duty.

As the people of the respective States had the exclusive power of determining, by their organic and general laws, the persons who were entitled to be electors for members of the House of Representatives, the power of punishing evasions, or violations of, or frauds committed against, such organic and general laws by individual offenders, necessarily belonged exclusively to the respective States.

It is, with great deference, submitted that the theory of the complete power of Congress over the elections of members of the House of Representatives, urged in an argument entitled to the highest respect, (*Federalist, No. 59,*) does not rest upon conclusive reasoning. Chief Justice Marshall, in *McCulloch vs. Maryland,* 4 Wheat., 433, said that in applying the opinions of the authors of that work to the cases which may arise in the progress of our government, "a right to judge of their correctness must be retained." It is true that the failure of the people of the States for two years to elect a majority of the members of Congress would deprive the country for a time of the services of its House of Representatives, and so absolutely stop legislation. It is equally true that the failure of the Legislatures of a majority of the States to perform for four years their duty of choosing Senators, would deprive the country for a time of the services of its Senate, and so absolutely stop legislation. It is not pretended that Congress would have, in the contingency last referred to, the power under the Constitution to appoint officers to canvass the votes of such Legislatures and to declare their choice of Senators. If the fourth section of the first Article of the Constitution does not, as is in effect admitted in the Federalist, enable Congress to provide for the election of Senators, in case of a failure of the Legislatures of any of the States to elect them, it is difficult to understand how it can suffice to support a claim to provide for the election of members of the House of Representatives, in case of some default in the people of the State to elect them. The more limited construction of the powers of congress would seem to be most reasonable.

If this argument is well founded, sections 2017, 2018, 2019 and 2022, and sections, 5511, 5514, 5515 and 5522, which depend for their validity upon the power of Congress to share with the several States the power, or to exercise the ultimate power, of conducting the elections for members of the House of Representatives, and to punish offences against the election laws of the several States, are all plainly in excess of the constitutional powers of Congress. They are encroachments upon the exclusive power of the several States to provide, by law, for the appointment of those who should collect, examine and announce the votes at an election for members of the House of Representatives. They are encroachments upon the exclusive rights of the respective States to punish offences against their own several organic and general laws ascertaining those who are entitled to vote for members of the House of Representatives.

Nor are these sections free from other difficulties. They depend for their validity on the power of Congress to devolve upon the Judges of the Circuit Courts of the United States the duty of appointing Supervisors of Elections.

Revised Stat. U. S., secs. 2011, 2012.

The clause of section 2 of Art. 2, of the Constitution of the United States, which authorizes Congress to vest, by law, the appointment of such inferior officers as they may think proper, in the President alone, in the Courts of Law, or in the Heads of Departments, must be read and construed distributively; it being the manifest purpose of the clause to authorize Congress to provide that minor executive and judicial officers, whose duties were within the scope of the general duties assigned to the President, the Courts of Law, or Heads of Departments, respectively, might be appointed by the President, and by such Courts of Law and Heads of Departments, respectively.

Congress could not, constitutionally, devolve upon the Judges of the Courts of the United States any power, or duty, which did not properly form part of the judicial power of the United States. Const., Art. 3, sec. 1.

Supervisors of election cannot aid the Courts of the United States in the execution of any one of the defined judicial powers committed to their charge; Art. 3, sec. 2; and, therefore, Congress could not, constitutionally, authorize such Courts to appoint Supervisors of election.

The duties which are devolved upon such officers by sections 2017, 2018, 2019 and 2022, of the Revised Statutes, are executive duties; and, if such duties can be constitutionally performed, the officers entrusted with their performance ought to be appointed by the executive department of the government.

It would seem, therefore, that Supervisors of election, as now appointed, are not officers properly appointed; and that all provisions of the Revised Statutes, which relate to them, are nugatory and void.

There are other objections to the constitutionality of the sections of the Revised Statutes, upon which the indictments in these cases were founded.

Those sections, and, all the sections, it is believed, contained in Title 26 of said Statutes, relating to the "Elective Franchise," are based upon an erroneous understanding of the true lines of division between Federal and State powers, and of the proper theory upon which Federal legislation ought to be framed.

The people of the United States ordained and established the Federal Constitution for the government of the United States as a

governmental whole, and not for the government of the individual States. Each State established a Constitution for itself, and in that Constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated.

Barron vs. Mayor and City Council of Baltimore, 7 Peters, 247.

Under the Constitution of the United States, certain exclusive powers are vested in the United States; certain exclusive powers remain in the respective States; and certain other powers may be exercised, concurrently, by the United States and by the several States, so long as their use by the several States is not inconsistent with their use by the United States.

Sturges vs. Crowninshield, 4 Wheat., 195, 196.
Houston vs. Moore, 5 Wheat., 24.
Gilman vs. Philadelphia, 3 Wallace, 730.

It was the purpose of that Constitution that the exclusive powers, conferred upon the Government of the United States, should be exercised exclusively by that Government; that the powers, reserved to the States, should be exercised exclusively by the people of such States; and that those powers which were concurrent in the United States and in the respective States should be exercised by the Federal and State Governments, if they could be properly concurrently exercised, in the same complete manner as if each were the sole possessor of such powers.

U. S. vs. Cruikshank, 92 U. S., 549, 551.
U. S. vs. Reese, 92 U. S., 221.

But it would seem to be an elemental principle of the Constitution of the United States that the legislative powers of the Federal and State Governments are wholly distinct; that the State Governments have not the constitutional power to enforce, by penal legislation, the observance of Federal laws; that the Federal

Government has not the constitutional power to enforce, by penal legislation, the observance of State laws; that the State Governments have not the power to devolve the execution of Federal laws upon State officers; and that the Federal Government has not the power to devolve the execution of State laws upon Federal officers.

U. S. vs. Fox, 95 U. S., 672.

U. S. vs. Reese, 92 U. S., 221.

If a State has jurisdiction over a particular subject matter, it must, in legislating in reference thereto, exercise its own powers only. It must command or prohibit for itself, and in its own name. It can only provide for the punishment of those who disobey what it has commanded, or do what it has prohibited. It cannot punish the violation of the laws of Congress.

U. S. vs. Fox, 95 U. S., 672.

If the Federal Government has jurisdiction over a particular matter, it must, in legislating in reference thereto, exercise its own powers only. It must command or prohibit for itself, and in its own name. It can only provide for the punishment of those who disobey what it has commanded, or do what it has prohibited. It cannot punish the violation of the laws of a State.

U. S. vs. Fox, 95 U. S., 672.

Rhode Island vs. Massachusetts, 12 Peters, 729.

If these propositions be true, Congress could not constitutionally confer upon a United States Marshal, and his general deputies, and upon the special deputies appointed by him, the power to keep the peace at the polls in any State, and to preserve order at the places of registration of voters and at such polls.

Revised Statutes U. S., sec. 2022.

The keeping of the public peace within the limits of a State, upon such occasions, is a common law duty and power, belonging to such State Government, which Congress cannot assume or devolve upon Federal agencies.

Congress could not, constitutionally, empower the Marshal of the United States, and his general and special deputies, to prevent fraudulent registration or fraudulent voting at the polls in any State at a Congressional election.

Rev. Stat. U. S., sec. 2022.

Slaughter House Cases, 16 Wallace, 77.

If any registration or voting at such polls was fraudulent, it was fraudulent because it was in contravention of some provision of the Constitution or laws of such State. Congress has not the power to make the violation of the Constitution or laws of any State an offence against the United States; nor can it devolve upon a Federal officer the power of enforcing the laws of a State.

Slaughter House Cases, 16 Wallace, 77.

Congress could not, constitutionally, provide a punishment for voting at a place within a State, where the offender was not lawfully entitled to vote, when the unlawfulness of his vote depended wholly upon the law of the State within which his vote was cast.

Revised Stat. U. S., sec. 5511.

Congress could not, constitutionally, provide a punishment for voting, without having a lawful right to vote in a particular State, when the unlawfulness of the act depended entirely on the law of the State in which it was committed.

Ibid.

Congress could not, constitutionally, provide for the punishment of persons within a State who did, in such State, some act forbid-

den by the laws of such State, to secure to himself, or another, an improper opportunity to vote.

Ibid.

Congress could not, constitutionally, punish an offender for violating the laws of the State in which he resided by preventing another from freely exercising the right of suffrage.

Ibid.

Congress could not, constitutionally, punish an offender for interfering with a State officer of election in the discharge of his duties.

Ibid.

Congress could not, constitutionally, punish a State officer for receiving the vote of a person, not entitled to vote under the law of a State, or for refusing to receive the vote of a person entitled to vote under the laws of a State.

Ibid.

Congress could not, constitutionally, by adopting a registration, made under the laws of any State, or territory, for a State, or other election, at which a Representative in Congress might be chosen, acquire the power to control the manner of making of such registration, or the power to punish any frauds, or offences, committed against State, or Territorial laws, in the making up of such registration.

Rev. Stat. U. S., sec. 5513.

Passing from these sections, which illustrate the erroneous theory upon which every portion of the Revised Statutes of the United States, relating to the "Elective Franchise," is grounded,

we may certainly assume that sections 5514 and 5515 are invalid. Congress could not constitutionally provide that the law of any State, or territory, should create *prima facie* evidence that any person was guilty of a violation of a Statute of the United States. Revised Stat. U. S., sec. 5514. Nor could Congress constitutionally provide for the punishment of a State officer, who might violate the requirements of the election laws of such State.

If Congress had no power to devolve the appointment of Supervisors of election upon the Judges of the Circuit Courts of the United States, it could not provide for the punishment of those who interfered with such officers in the performance of their assumed duties. If Congress had no right to share with the particular States the duty of preserving peace at the polls, it had no power to provide for the punishment of those who obstructed Federal officers in the execution of illegal powers, or who refused to assist such officers in their attempts to execute such illegal powers.

Revised Stat. U. S, sec. 5522.

If Congress has a complete, "ultimate" discretionary power over the elections of members of the House of Representatives, and may make all the regulations on this subject, which a State can make, and can alter the regulations of a State as to such elections as completely as the State enacting them could alter them,—it must certainly exercise these powers in a proper way. If the whole power is exercised by Congress, it must enact a system of election laws, regulating the election of members of the House of Representatives, which will be complete and operative in itself. If the partial power is exercised, it must, nevertheless, be exercised by enacting a law which, while it alters the laws of the States regulating elections for members of the House of Representatives in some particular, will nevertheless be, in itself, in such particular, complete and operative as a Federal law.

It is respectfully submitted, that the sections of the Revised Statutes, upon which these indictments were founded, not having been passed in pursuance of a constitutional power, and not being constitutional in form, substance and effect, are void, and that the petitioners, who have been deprived of their liberty under such unconstitutional provisions, ought to be discharged from custody.

CHARLES J. M. GWINN,
Attorney-General of Maryland
appearing for the Petitioners.

IN THE

Supreme Court of the United S

OCTOBER TERM, 1879.

Ex parte SIEBOLD, TUCKER, BURNS, COLEMAN AND BOWERS.

PETITION FOR HABEAS C

SUMMARY OF THE ARGUMEN

SUBMITTED BY

BRADLEY T. JOHNSON,
Of Counsel for the Petitione

EX PARTE

SIEBOLD,

TUCKER, BURNS,

COLEMAN & BOWERS

Petition for Habeas Corpus.

SUPREME COURT

UNITED STATES.

OCTOBER TERM, 1879.

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Summary of the Argument.

This is the case of five election judges, appointed under the laws of Maryland, and convicted in the Circuit Court of the United States for the District of Maryland, under those sections of the Revised Statutes which provide regulations of the manner of holding elections for members of Congress.

Siebold is convicted of doing an act unauthorized by the laws of Maryland or of the United States. (Record, page 12.)

Tucker is convicted of preventing and hindering a Special Deputy Marshal in his free attendance at the polls, (page 15); and also of doing an act unauthorized by the laws of Maryland or the United States. (Pages 16–17.)

Burns is convicted of hindering a Supervisor of Elections in his duty of inspecting and scrutinizing the manner in which the voting was done, and of keeping him out of the room where the poll of election was held; and also of resisting a Special Deputy Marshal and the United States

Marshal in their arrest of him for his offence of hindering the said Supervisor of Elections. (Pages 20, 21, 22.)

Coleman is convicted of hindering a Special Deputy Marshal in his free attendance at the polls, and of supporting and protecting a Supervisor of Elections in the performance of his (the Supervisor's) duties at the election ; and also of doing an act unauthorized by the laws of Maryland or the United States. (Pages 24, 25.) And

Bowers is convicted of hindering a Supervisor in the performance of his duty—of personally inspecting and scrutinizing the manner in which the voting was done at the poll of election. (Page 28.)

Under these convictions they are now confined in the custody of the Marshal of the United States for the District of Maryland and the Warden of the Jail of the City of Baltimore, from which imprisonment they pray to be relieved by this Court on Habeas Corpus.

I.

The Act of Congress, under which they have been convicted, and are now deprived of their liberty, is set forth in Title XXVI of the Revised Statutes, in sections 2011, 2012, 2016, 2017, and in other sections under the title "Crimes," being sections 5514, 5515 and 5522.

These sections are the regulations prescribed by law of the manner of holding elections for Representatives in Congress, which law has been passed under the power granted to Congress by article 1, section 4 of the Constitution of the United States.

They provide that *the Circuit Courts* shall appoint Supervisors of Elections, whose duty it shall be to guard and scrutinize the manner in which elections at which Representatives in Congress are voted for, are held by the officers appointed under State laws to conduct the same, and to inspect the registration of voters, the voting and the counting of

the ballots, and watch generally that the election be fairly conducted.

They further provide that the Marshals of the United States shall appoint Special Deputy Marshals, whose duty it shall be, to attend the places of registration, and voting, support and protect the Supervisors of Elections in the performance of their duties, to prevent fraud on elections, and to keep the peace at the polls.

The Supervisors are the superintendents of the manner in which State officers perform their duties, and the Marshals are to protect the Supervisors, and prevent the State officers from committing frauds, and to preserve order.

The punitory part of the law then denounces penalties on every person for preventing Supervisors and Special Deputy Marshals from performing these duties; and furthermore, particularly provides punishments for officers of elections, appointed under State laws, for neglecting to perform their duties under such State laws; or who violate their duties imposed on them by such laws; or who do any act not authorized by any law of the State, or of the United States, with intent to affect the election.

These are the regulations of the manner of holding the elections for Representives in Congress, made by law of Congress, under the article and section of the Constitution referred to.

It is claimed that they are not a proper execution of the power conferred on Congress in that section, and are, therefore, unconstitutional and void.

And that the petitioners having been convicted, and being now held under a void law, must be discharged.

II.

Article 1, section 4 of the Constitution is the only source from which power is claimed to enact such laws. It is as follows :

"THE TIMES, PLACES AND MANNER OF HOLDING ELECTIONS FOR SENATORS AND REPRESENTATIVES SHALL BE PRESCRIBED IN EACH STATE BY THE LEGISLATURE THEREOF; BUT THE CONGRESS MAY AT ANY TIME, BY LAW, MAKE OR ALTER SUCH REGULATIONS, EXCEPT AS TO THE PLACES OF CHOOSING SENATORS."

The intent and meaning, the purpose and object of this clause of the Constitution are plain and manifest from the historical *resume* (in the brief, pages 57, 58) of its origin, development, adoption and contemporaneous construction. It was part of the compromise upon which the Constitution was founded, between the friends of a National government of the people, led by Edmund Randolph, and the adherents of the scheme of a confederacy of States, whose views were presented by William Patterson.

They all, at last, united, in support of a plan of government, in which States should be represented in the Senate, and the people in the House; the one body composed of equal representatives of the State; the other of those of the people. One preserved the equality of the States, the other the power of the people. The Representatives of the latter were to be elected by electors, whose qualifications were fixed by the States, but they represented the whole body of the people. They were the popular part of the government.

The time, place and manner of holding the elections for these democratic representatives were directed and required to be fixed by the States. It was considered more expedient, in the language of Mr. Madison, that this duty should be first committed to the States. But then it might happen that States might neglect or refuse, as Rhode Island had done; or might be disabled by invasion, as South Carolina had been, from performing this Federal duty; or it might happen that the State Legislatures, already represented in the Senate, would so use their power as to be also represented in the House, and thus the compromise be defeated, the people deprived of their democratic representation, and

both Senate and House be the creatures of the States; or it might happen that refractory States might break up the government by withdrawing their Representatives.

In order, therefore, to provide for the performance of the Federal duty, if the States, for any reason, should fail to perform it; and to secure the balance between the Federal Senate and the Democratic House, and prevent the preponderating influence of the States; and to create in Congress itself power to perpetuate itself, the power was granted to the Congress, at any time, by law, to make or alter such regulations of the time, place and manner of holding the elections of the representatives of the people.

There is no power anywhere in the Constitution granted to the Federal government to coerce a State to the performance of a Federal duty. It is the duty of States to deliver up fugitives from justice; to elect Senators; and to appoint Electors to choose the President; but if the States fail to perform these duties, no attempt is made to provide means of compelling them to do so. Other methods are provided of having the duty performed, and the States are left entirely alone.

So, in this matter, in order to secure a proper, just and equal exercise of the power by the States, the right is specifically granted to the Congress, at any time they considered necessary, to make regulations by law.

The object to be accomplished was the election of Representatives of the people to the People's House; to secure the balance between the States and the people; and to enable this to be done by elections absolutely free from interference or influence by the States. The power to accomplish this object was deposited in the Congress, to be exercised whenever, in its discretion, such exercise was proper.

The mode of the exercise is to be by making regulations by law of Congress.

The laws making such regulations must be appropriate to the object, and consistent with the Constitution

they disobey; but a Federal Supervisor may consider a vote legal which a State Judge believes to be illegal; and a Federal Court may construe a vote to be legal which a State Court decides to be illegal. In either event the State Judge is liable to suffer; he is being operated on, at the same time, by two distinct wills in relation to the same subject-matter, to wit: the manner of holding the election—which this Court has said cannot be done. Besides this, these Federal officers, *without warrant*, can arrest any officer of the State; while no officer of the State *with warrant* can, on the day of election, arrest any one of these Supervisors or Special Deputy Marshals for any offence, including treason and felony.

The cases at bar are those of Judges of Election who have been convicted under this law. In another case, a Governor of a State was haled to the bar of a Federal Court, and put upon his trial for not performing his duty in regard to elections, under the laws of the State whose Executive he was, and whose laws *he*, and not the Federal Court, was sworn to execute.

U. S. vs. Clayton, 2 Dillon, 219.

A law which of necessity and unavoidably brings on such conflicts between Federal and State power, caused solely and alone by the attempt to regulate only part of "the manner of holding elections," and by leaving the residue of the manner to be regulated by the State, is unconstitutional; and if, in order to prevent this collision, the States withdraw the regulations "of the manner of holding the elections" made by them, then the whole system fails, and the very evil which the power was granted to Congress to prevent, will occur. No elections can be held.

It was given as a power of self-preservation; it may be made by the fiat of the States—the power of self-destruction.

V.

Second. But if this power is not conclusive and entire, and may be exercised on a part of the subject, then such part as it does regulate, must be beyond the control of the States.

Any regulation that is made must be *by law* of Congress, enacted by it, and subject to repeal or modification only by it. The regulations must be made *by law,* and the power to make them cannot be delegated.

Congress could not provide that the Attorney General or the President should, from time to time, make or alter such regulations of the manner of holding elections as he might consider necessary and proper.

The regulations, therefore, must be beyond the control of any body but Congress. But especially must they be beyond the interference or control of the States.

The very evil, to remedy or prevent which this power was created in Congress, was the evil of State intervention or non-action; and when a remedy is applied which leaves the evil untouched, then such remedy cannot be a constitutional exercise of power. Now the regulations made by this law of Congress do this precise thing. They leave the whole manner of holding the election absolutely and entirely within the control of the States; for the election itself may be dispensed with, or the law authorizing the election be repealed, and thus the law making the regulations rendered inoperative.

Now the law of Congress making these regulations either—

A. Adopts and thereby re-enacts all State election laws in force at the time of its enactment.

B. Or it does not adopt them.

C. Or it adopts in advance each modification and alteration of the State law as may be thereafter made by the State.

A. If these Acts of 1870 and 1871, re-enacted by the revision of June 24, 1874, adopted all the State election laws then in force, those State election laws became thereby Federal laws and regulations just as much as if they had been re-enacted and set out *totidem verbis* by the Congress. They are in force now as Federal laws.

But any State, since 1874, may have repealed her election laws, and enacted other different regulations of the manner of holding elections. The State of Maryland, whose Election Judges have been convicted, and who now pray to be released, has actually done so. The regulations made by Law of Congress adopted and re-enacted the regulations of the manner of holding elections in existence in Maryland in June, 1874. Those regulations provided that Judges of Elections for the city of Baltimore, should be appointed by the Board of Police Commissioners, who were elected by the Legislature.

The congressional regulations, therefore, in Baltimore applied to Judges of Election, appointed by the Board of Police Commissioners, and to no other Judges of Election, created in another mode. But the General Assembly of Maryland, by Act of 1876, chapter 223, passed April 3, 1876, repealed those sections of the Code of Public Local Laws of Maryland, which thus provided for the appointment of those Judges, and created instead "*a Board of Supervisors of Elections for the City of Baltimore, who shall be appointed by the Governor, and who shall appoint three Judges of Election for each Election Precinct of said City, one of whom shall be of a political party different from that with which the other two are connected.*"

The Judges under the Maryland Act of 1876—that is, the Judges who were convicted—are different Judges, appointed by a different department of Government, with entirely different requisites and qualifications, from the Judges contemplated by the Act of Congress, appointed under the adopted Federal-State or State-Federal law.

Therefore, if the Law of Congress adopts the State regulations in force at the time of its passage, it can be, and has been in Maryland, actually repealed and modified.

Or the State regulations adopted by Act of Congress in 1874 may be entirely repealed, and instead of them, others might be substituted which merely provided for the appointment of Judges of Election, with general directions to hold the election in such manner as in their discretion they considered most proper and reasonable. What then would become of the congressional regulations by adoption of 1874? Upon what could they operate? The only duty imposed by State regulations would be to hold the election in such manner as they, in their judgment, deemed reasonable and proper. Could the Judges be held responsible, under the Law of Congress, for an unreasonable exercise of this discretion?

But if, on the other hand, the regulations adopted by the Law of Congress be considered the supreme law and regulations; and that all regulations subsequently made by States inconsistent with them be considered invalid, so that the State law altering or repealing them would be void, still if such State law be passed, so altering or repealing the regulations before then adopted by Law of Congress, and the election be held under such void law, by Judges appointed under such void law, those Judges so appointed could not be held responsible for malfeasance or non-feasance under such void law. If the subsequent State law be void, all proceedings under it are void.

B. Or the Law of Congress does not adopt the regulations of the manner of holding elections prescribed by the States.

If this is so, then such regulations remain subject to modification, repeal, and entire control of the States; and this Law of Congress does not make regulations of the manner of holding the elections, and is, therefore, no appropriate exercise of the power granted.

C. Or the Law of Congress adopts each modification of the regulations prescribed by the States as soon as they are made, which *then* become regulations made by Law of Congress.

But this will be a delegation of the power granted to Congress to make regulations by law. The legislative power cannot be delegated. "Where the sovereign power of the State has located the power to make laws, there it must remain; and by the constitutional agency alone must the laws be made." (Cooley on Const. Lim. 117.)

In Martin vs. Hunter, it was held that no part of the judicial power of the United States can be conferred on State officers; *a fortiori* is it that no part of the legislative power of the United States can be delegated to the States.

VI.

Third. And this power must be exercised by appropriate and constitutional laws, which laws must contain and set forth the regulations made, and must not delegate the power of making them to any other authority whatever.

The power conferred is to make regulations "*by law.*" It is not to regulate or to provide for making regulations, but the regulations must be contained and specified in, and set forth by the law which makes them.

The object of the power, the reason for which it was conferred, was to secure the elections of the Representatives of the people in the Lower House free from the cabals of refractory States; above the misfortunes of the unfortunate; beyond the carelessness of the negligent; to preserve and perpetuate the Government for all time, by providing it with the means by which it could communicate with and operate directly upon the people, free from the interference or control of the States, and thus secure an unbroken succession of Representatives in the House.

But the regulations made by this Act of Congress are, as we have shown, entirely subject to the power of the

States, and are not appropriate to the end in view, and do not tend to accomplish the object for which the power was granted, to wit: the election of Representatives in Congress free from the control or interference of the States; and these regulations thus made by this law, are not made by a law appropriate to the object.

They are to be regulations of the manner of holding the elections. Regulations imply rule, and as Mr. Madison said, ought to be uniform throughout the Continent. They denounce penalties on State Judges for doing acts forbidden or not authorized by State laws. Under these regulations it may become the duty of the Chief Justice to sentence a State Judge in Maryland for opening a ballot when it was handed to him by the voter; the next week he may be obliged to punish a State Judge in Virginia for failing to open a ballot when delivered to him; the week after he may be obliged, under these regulations, to imprison State Judges in North Carolina for receiving and recording a *viva voce* vote; and two days after that to send State Judges in South Carolina to the same prison for refusing to receive such *viva voce* vote. And worse than this, when two years after he again goes his circuit, he may find all the laws changed, and those things which were unlawful in Maryland rendered lawful, and those things which were lawful made unlawful; and so in each of the other States.

So that it may happen, and it can happen, that two citizens of Maryland may be confined in the same prison—the one for doing a thing, and the other for not doing the self-same thing—each punished under the same regulations made by Law of Congress unchanged by Congress, and sentenced by the same Court speaking by the same Chief Justice.

It cannot be that these regulations made by law can be such regulations of the manner of holding elections made by such law as is required by the whole spirit of the Constitution, and authorized by the clause in the Constitution under consideration.

That this power cannot be delegated has been shown above. That this exercise of it by this law is unconstitutional will be demonstrated hereafter.

VII.

Fourth. The regulations made by law of Congress of the manner of holding elections must be enforced by Federal power, acting through Federal officers, Constitutionally appointed.

A. The scheme of the American Constitution is a system of co ordinate Governments and co-ordinate departments. Each Government and every department must operate within its own sphere, and neither can interfere with nor impose duties on the other. The Federal Government can no more impose part of its duties on the State Governments than the Legislative Department can impose part of its duties on the Executive; nor require the Judiciary to perform the functions of the Executive. The Federal Government is provided with all the powers necessary for the full and perfect execution of its functions. It is a Government in part of States, as was said by the Chief Justice in Cruikshank's case. It is also, for certain purposes, a Government of the people.

The Constitution imposes obligations on States, but it provides no means by which States can be compelled to perform them.

This Court, speaking by Chief Justice Taney, in Kentucky vs. Dennison, 24 Howard, 107, says:

"NOR IS THERE ANY CLAUSE OR PROVISION IN THE CONSTITUTION WHICH ARMS THE GOVERNMENT OF THE UNITED STATES WITH THIS POWER. INDEED SUCH A POWER WOULD PLACE EVERY STATE UNDER THE CONTROL AND DOMINION OF THE GENERAL GOVERNMENT, EVEN IN THE ADMINISTRATION OF ITS INTERNAL AFFAIRS AND RESERVED RIGHTS."

And the present Court, by Mr. Justice Nelson; in The Collector vs. Day, 11 Wallace, declares that "*any Government, whose means employed in conducting its operations, if subject to the control of another and distinct Government, can exist only at the mercy of that Government.*"

And if the Congress can impose duties on State Judges of Election in regard to elections, and provide penalties for non-performance of them, they can as well require other things in relation thereto to be done by the Governors, the Judiciary and the Legislative Departments, and thus, in fact, the State Governments would exist only at the mercy of the General Government.

While, therefore, it is clear that the Congress cannot impose duties on State officers, as was decided by this Court in Prigg vs. Penn., it is equally clear that it cannot punish them for non-performance of their duties under State laws.

If the Constitution provides no means by which the General Government can compel a State to perform a duty required of the State by the Constitution, and if the Congress cannot compel a State officer to perform a duty imposed by itself, *a fortiori* is it that it can provide no means by which State officers can be compelled by the Federal authority to perform their duties to their States, under State laws.

These regulations, made by this law of Congress, denounce punishments against State Officers of Election for doing what they are forbidden to do; for not doing what they are commanded to do; and even further than that, for doing things unauthorized by State laws.

If these State laws are to be considered State regulations of the manner of holding the elections, then it is clear that the law of Congress, punishing State Judges for violation of State duties, as State officers under State laws, is contrary to the Constitution, and void; or if these State regulations are to be considered as having been adopted by Congress, and thereby to have become Federal regulations, then this law,

requiring these Federal regulations to be enforced by State officers, is void. Federal laws must be enforced by Federal officers, and can be enforced by none other.

B. The State officers cannot become Federal officers by adoption, and thereby become amenable to Federal law.

Under the Constitution, article 2, section 2, officers of the United States can only be appointed in the manner therein provided.

The manner of appointment is—

1st. Under the Constitution.

2d. By the President, with the advice and consent of the Senate; and when Congress has, by law, vested the appointment of inferior officers.

3d. By the President alone.

4th. By the Courts of law. And

5th. By the heads of departments.

And by article 2, section 3, the President shall commission all officers of the United States.

These State Judges of Election, therefore, cannot become Federal officers by adoption, because they are neither appointed nor commissioned in the manner prescribed by the Constitution. They are State officers, and cannot be compelled to execute Federal laws; nor be punished under this Act of Congress for not executing State laws.

As a Government of States the Constitution imposes certain duties on the States. But when they fail, neglect or refuse to perform those duties, there is no power to compel them as States. The force of the Government of the people is then applied, and the Federal power, operating directly on the people by its own laws, executed by its own officers, secures the performance of those duties which the States ought to, but have failed to perform.

C. And the officers, to enforce the regulations made by law of the manner of holding elections, must be Constitutionally appointed.

The regulations made by law of Congress provide for the appointment of—

1st. Supervisors of Elections, by the Circuit Courts, whose duty it shall be to scrutinize and to guard the election, to attend the polls, inspect the count, and watch generally the manner in which the State Judges perform their duties.

2d. Special Deputy Marshals, who shall protect the Supervisors in the discharge of their duties, and likewise watch, guard and scrutinize the manner of holding the elections provided by the States.

The Supervisors of Elections are Executive officers, and their appointment cannot be vested in the Courts.

Ex parte Henen, 13 Peters, 258.
Haymun's Case, 2 Dall, 409.
Letters of the Justices to the President—note to Haymun's Case.
Ferreira's Case, 13 Howard, 53.
Note to same prepared by order Chief Justice Taney.
State vs. Stanly, 66 N. C. 59.
The Supervisors of Election, 114 Mass. 247.
Murray vs. Hoboken Land Co., 18 How. 27.
Ex parte Vallandingham, 1 Wall. 253.
Dash vs. VanKleck, 7 Johns. 498.
Ogden vs. Blackledge, 2 Cranch. 272.
Governor vs. Porter, 5 Humph. 165.
People vs. Supervisors, 16 N. Y. 424.
Reiser vs. Tell Association, 39 Penn. 137.
O'Conner vs. Warren, 4 Watts. & Sergt. 227.
Lambertson vs. Hogan, 2 Penn. St. 25.
State vs. Fleming, 7 Humph. 152.
Sill vs. Village of Corning, 15 N. Y. 303.

The Supervisors of Elections, therefore, have no legal existence; and the fact of their appointment by the Courts, and the acceptance of the duties of the office, will make no difference, as will be seen by the decision of this Court in Yale Todd's case, reported in the note to Ferreira's case.

The Supervisors' acts are void, and no man can be punished, under these regulations made by Congress, for resisting them in the performance of their so-called duties. But the duties of the Special Deputy Marshals are to assist and protect the Supervisors, and also to watch the State Judges and to preserve order at the polls. All these duties are so inextricably mingled and mixed that it is utterly impossible to separate them; and when a man resists a Marshal in the performance of his duties—part of which are unconstitutional, and part legal—no one can tell where the void part ends, and where the valid part begins; therefore, the law, so far as it imposes these mixed duties on the Marshals, is unconstitutional also.

VIII.

It follows, therefore—

1st. That the Act of Congress is unconstitutional in so far as it imposes penalties on State Officers of Election for violation of duty under State laws.

2d. That it is unconstitutional in so far as it imposes on Circuit Courts the appointment of Supervisors of Election.

3d. That it is unconstitutional in so far as it requires Deputy Marshals to assist and protect Supervisors of Election in the discharge of their duty, and to keep order at the elections, when such order consists in part of protecting the Supervisors.

4th. That it is unconstitutional in so far as it mixes and mingles the duty of the Deputy Marshals and Marshals to assist Supervisors of Election, to maintain order in pro-

tecting them, together with the duty of preventing fraud at said election, for if the last duty be valid, the others are, beyond doubt, void, and the mixture vitiates the good.

IX.

We, therefore, claim that—

1st Siebold shall be released because he has been convicted in that being a State Judge of Election he did things unauthorized by the laws of the State or of the United States ;

2d. That Bowers shall be released because he stands convicted of resisting a Supervisor of Election in the discharge of his duties, when such Supervisor and his duties have no legal existence ;

3d. That Coleman shall be discharged because he is convicted of resisting a Special Deputy Marshal in the performance of his duty of being present at and freely attending the polls, and of supporting and defending a Supervisor of Elections thereat ; and, also, that being a State Judge of Election, he did an act unauthorized by any law of the State or of the United States ;

4th. That Tucker shall be released because he is confined in that he hindered and prevented a Special Deputy Marshal in his free attendance at the polls, and his free access thereto ; and, also, that being a State Judge of Election, he did an act not authorized by any State or Federal law ; and

5th. That Burns shall be discharged by this Court because he stands convicted and confined on account of having hindered and prevented a Supervisor in the discharge of his duty, and then resisting a Special Deputy Marshal and the Marshal himself in their attempt to arrest him for his offence against the Supervisor.

BRADLEY T. JOHNSON,
Of Counsel.

In the Supreme Court of the United States.

No. 7 Original.

~~BEFORE THE HON. MORRISON R. WAITE, CHIEF JUSTICE OF THE SUPREME COURT OF THE UNITED STATES.~~

October Term 1879.

EX PARTE HENRY BOWERS AND FOUR OTHERS.
APPLICATION FOR WRIT OF HABEAS CORPUS.

BRIEF FOR THE UNITED STATES.

BEFORE THE ~~HON. MORRISON R. WAITE, CHIEF JUSTICE OF THE~~ SUPREME COURT OF THE UNITED STATES.

EX PARTE HENRY BOWERS AND FOUR OTHERS. APPLICATION FOR WRIT OF HABEAS CORPUS.

BRIEF FOR THE UNITED STATES.

This is an application for the writ of *habeas corpus*, made to the Chief Justice of the Supreme Court in his capacity as circuit justice of the fourth circuit, by Henry Bowers, Martin C. Burns, Walter Tucker, Lewis Coleman, and Albert Siebold, upon which application an order to show cause was granted by the Chief Justice, returnable before him in the city of Washington on the 14th of October, 1879. The petition of each of the applicants sets forth substantially the following facts:

That on the 5th of November, 1878, an election was held in the State of Maryland for members of Congress of the United States, and that the time, place, and manner of holding such election had been prescribed by the legislature of that State;

That the petitioner was one of the judges of said election, duly appointed under the laws of said State, and

that he discharged his duty as such judge under said laws at said election;

That he was indicted and convicted at the November term, 1878, of the circuit court of the United States for the district of Maryland, on an indictment charging that the petitioner, being a judge of election as aforesaid, did, by the exercise of his power and authority as such judge, hinder and prevent a certain United States deputy marshal and a certain United States supervisor of elections (duly appointed under sections 2012 and 2021 of the Revised Statutes of the United States) from discharging their duties of inspecting, superintending, and supervising the said election, and also that the petitioner did an act unauthorized by any law of said State or of the United States [with intent thereby to affect such election and the result thereof], contrary to sections 5515 and 5522 of the Revised Statutes.

And that, upon conviction, the petitioner was sentenced to be imprisoned for twelve months in the jail of the city of Baltimore, and was by said court committed to the custody of the marshal of said district, who now holds him by virtue of the judgment and commitment of said court, &c.

The ground of the application is, the alleged unconstitutionality of the statutes under which the parties were indicted.

It appearing by their respective petitions that each of the petitioners is in prison pursuant to a judgment of the circuit court of the United States for the district of Maryland, rendered in a criminal prosecution against him under certain statutes of the United States, the in-

quiry arises at the outset, whether the petitioner can be relieved by means of the writ of *habeas corpus* on the ground upon which the application therefor is made.

In regard to this preliminary question we submit—

1. The circuit court, having "cognizance of all crimes and offenses cognizable under the authority of the United States" (R. S., sec. 629), had jurisdiction of the cause, and its judgment therein cannot be re-examined by *habeas corpus*.

The jurisdiction of the circuit courts of the United States, in criminal cases, is by virtue of section 629, Revised Statutes, so broad, that it is co-extensive with the judicial power of the United States in regard to such cases. Extending to "all crimes and offenses cognizable under the authority of the United States," it necessarily embraces all cases of that character which arise "under the Constitution and laws of the United States." And as the judicial power covers every legislative act of Congress, whether it be made within the limits of its delegated powers or be an assumption of power beyond the grants of the Constitution (Ableman *vs.* Booth, 21 How., 520; Mayor *vs.* Cooper, 6 Wall., 252), so the jurisdiction of the circuit courts extends to all crimes and offenses created by any legislative act of Congress. Hence, in a criminal proceeding under an act of Congress, jurisdiction of the *cause*—that is, the right to take cognizance thereof and to decide all questions of law occurring therein, even the question of the validity of the act under which the proceeding is had—is acquired by the circuit court simply by the fact of the

existence of such an act and the allegation of an offense under it.

The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action.

United States *vs.* Arredendo, 6 Pet. 709.
See also Cent. Pac. R. R. Co. *vs.* Placer Co., 43 Cal., 368–9.
Ex parte Bennett, 44 Cal., 88.
Ex parte Tracy, 25 Vt., 93, 96.
Ex parte Greenough, 31 Vt., 279, 285.
Ex parte O'Connor, 6 Wis., 288.
King *vs.* Poole, 36 Barb., 242.
Sheldon *vs.* Newton, 3 Ohio St., 499.
Ex parte Kellogg, 6 Vt., 509, 511.

The writ of *habeas corpus* has not the scope nor does it perform the office of a writ of error or appeal. When it is alleged that a prisoner is in custody by virtue of legal process, the existence of the process and its validity upon its face become a legitimate subject of inquiry under the writ of *habeas corpus*. So matters which entitle a prisoner to his discharge, such as the expiration of the period of time for which he was sentenced, a pardon, or payment of the fine imposed as punishment, are subjects upon which the judge issuing the writ may hear proof, and when established constitute good cause for the prisoner's discharge. But there can be no reexamination of any matter that goes to the grounds of the judgment upon which the commitment was made.

People *vs.* Cavanagh, 2 Parker's C. C., 650.

Thus, in *Ex parte* Fisher (6 Neb. R., 309), where on *habeas corpus* it appeared that the prisoner was detained

by the judgment and commitment of a justice of the peace in a criminal action under a license law of the State—the justice having jurisdiction thereunder where the penalty did not exceed a certain sum—the court was asked to discharge the prisoner on the ground of the invalidity of the law. But the court dismissed the writ and remanded the prisoner, holding that *habeas corpus* is not a proper proceeding to review the judgment under which he was detained.

In the opinion of the court in that case (which is exactly in point here) it is remarked that, "after judgment and commitment in a criminal action by an inferior court having jurisdiction of the offense charged, we think that *habeas corpus* is not the proper mode of procedure to bring the cause into this court for review upon alleged errors of law; for it seems to us that, when the validity of a statute is controverted, the controversy raises a legal question, which, like all other legal questions raised on the trial of a cause in an inferior court, can be reviewed only by the mode prescribed by law. To entertain jurisdiction in such case upon a writ of *habeas corpus*, it would be necessary to look beyond the judgment and re-examine the charges upon which it was rendered, as well as to review the questions of law raised on the trial and decided by the inferior court. If such practice were to obtain, then, indeed, every conviction for a criminal offense might be brought here for review on a writ of *habeas corpus*. We think it is not within the province of this court to open the door to such a system of practice. And we are not prepared to say that, upon a writ of *habeas corpus*, we can look beyond the judgment and reexamine the charges on which it was rendered, or pronounce the judgment an absolute nullity on the ground

that the constitutionality of the statute relative to the license law is controverted. If the validity of a statute is brought in question in an inferior court on the trial of a cause, that question must finally be determined in the same mode as other legal questions arising on the trial of causes in such court—that is, by proceedings in error or appeal, as may be most appropriate and allowable by law."

So, in the matter of J. A. Harris (47 Mo., 164), which was a petition for *habeas corpus*, it was held that where one has been arrested on legal process by a court having jurisdiction of the person and the offense, and is in custody of the proper officer, the constitutionality of the law under which he was arrested will not be inquired into on a writ of *habeas corpus*.

Agreeably to this doctrine it has been recently held by the Supreme Court of the United States that where an inferior court has jurisdiction of the cause and the person in a criminal suit, and no writ of error lies from the Supreme Court, the latter court will not on *habeas corpus* review the legality of the proceedings.

Ex parte Parks, 93 U. S., 18.

The court there observes: "To review the decision of that court (a district court of the United States) by means of the writ of *habeas corpus* would be to convert that writ into a mere writ of error, and to assume an appellate power which has never been conferred upon this court."

If a judgment is absolutely *void*, then *habeas corpus* would lie to release one from imprisonment under it; if good until reversed, as is the case here, *habeas corpus* will not prevent its execution. (See 3 Peters, 202; Ex p. Bushnell, 9 Ohio St., 183; Ex p. Williamson, 26 Penn. St., 9; People *v.* Orser, 12 Howd. Pr. (N. Y.), 550; Ex

p. Baker, 11 Howd. Pr., 425–6; Ex p. Prime, 1 Barb., 349, 350; People *v.* Cavanagh, 2 Abb. Pr., 85; People *v.* McCormack, 4 Parker's Crim. Cas., 9; Ex p. Van Aernam, 3 Blatch., 160.)

An examination of the earlier cases decided in the Supreme Court upon *habeas corpus* will show that the court, while it has examined the regularity of proceedings in cases thus brought before it, so far as to ascertain whether the lower court had jurisdiction or has exceeded its authority, it has not passed upon questions of law, constitutional or other, which were properly before the judge at the trial.

See *Ex parte* Watkins, 3 Peters, 193; in this case the court, after reviewing the earlier cases of *Ex parte* Hamilton, 3 Dall., 17; *Ex parte* Burford, 3 Cranch, 477; and *Ex parte* Bollman and Swartwout, 4 Cranch, 75, observes that "In no one of these cases was the prisoner confined under the judgment of a court."

See also same case, 7 Pet., 568; *Ex parte* Kearney, 7 Wheat., 38; and *Ex parte* Metzger, 5 How., 176, in which the court says: "However erroneous the judgment of the court may be, either in a civil or criminal case, if it had jurisdiction, and the defendant has been duly committed, under an execution or sentence, he cannot be discharged by this writ" (*habeas corpus*). Ex parte Lange, 18 Wall., 163.

In a later case (Ex parte Jackson, 96 U. S., 727) the court did, upon an application for a *habeas corpus*, pass upon the constitutionality of the act under which the petitioner was imprisoned, and decided that it was constitutional. It is obvious that if such was the opinion of the court, the question whether, if unconstitutional, the court could or would have discharged the prisoner

when he had been convicted by a court of competent jurisdiction, did not necessarily arise. The last sentence of the opinion is apparently a waiver of that question.

2. It is not within the competency of a circuit justice or judge, on *habeas corpus*, to review a judgment of the circuit court in a criminal proceeding under an act of Congress.

In re Callicott, 8 Blatch. C. C., 89.

The case just cited was an application for a writ of *habeas corpus*, made to the circuit judge of the second circuit, alleging that the petitioner was in prison under sentence of the circuit court of the United States, pronounced in the eastern district of New York in a criminal prosecution under a statute of the United States, &c. The judge (Woodruff), upon examination of authorities, held that he had no jurisdiction to review the judgment of the circuit court. "That court," he observed, "had jurisdiction of the matters charged in the indictment, and to determine whether the acts therein alleged constituted an offense against the laws of the United States, and, by the aid of a jury, to try and determine whether the petitioner was guilty of those acts. From the judgment of that tribunal no appeal lies to me as judge. No writ of error lies to me; and, if my opinion was that the learned judges by whom the court was held when the judgment was pronounced committed an error, I have no power to revise or to reverse the judgment." Further on he adds: "No case is cited to me in which the Supreme Court, or any court of the United States, has countenanced the idea that a judge can, under or by virtue of the writ of *habeas corpus*, practically reverse a judgment of the circuit court, for error, and discharge a prisoner from its sentence."

3. The limitations of the writ of *habeas corpus*, as well as the purpose for which it may be used, are stated at length in section 753 R. S., which is as follows:

"The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States, or is committed for trial before some court thereof, or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof; or is in custody in violation of the Constitution or of a law or treaty of the United States; or, being a subject or citizen of a foreign state, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign state, or under color thereof, the validity and effect whereof depend upon the law of nations; or unless it is necessary to bring the prisoner into court to testify."

This section applies alike to section 751 and section 752. It defines the powers of the justices, as well as of the courts, who are authorized to issue this writ. When, therefore, it gives by negation (as it undoubtedly does) power to discharge a prisoner who is in custody in violation of the Constitution, or of a law or treaty of the United States, it becomes necessary to inquire what is the meaning of this sentence.

This court has repeatedly held that it will not discharge a prisoner upon writ of *habeas corpus* by reason of any error of law made by the court at the trial, provided the court had jurisdiction of the prisoner and the cause.

Ex parte Parks, 93 U. S., 18, and cases cited.

Yet if an error were committed by such court, it is obvious that the prisoner is detained in violation of a law of the United States. It would be difficult to see

any reason why all the law of the trial should not be here investigated (if it may be investigated at all) as that which is strictly constitutional in its character. The same reason exists in the one case that exists in the other. The meaning of the sentence would seem to be that the court must inquire whether or not the prisoner is detained in violation of the forms provided by the Constitution and laws, as he would be if detained by a court not having jurisdiction; but whether the court having jurisdiction of the cause and the prisoner has made an error in its construction of the Constitution or law cannot be here re-examined. Unless this construction be adopted, as the power to determine whether the prisoner is detained in violation of the Constitution or laws of the United States rests not alone with this court, but with every justice of this or of the district or circuit court, it would follow that after a prisoner had been convicted by the circuit court it would be in the power of the district court to release him because he had been convicted in violation of the Constitution and laws, notwithstanding such court had jurisdiction of the cause, and when, in point of fact, there was simply a difference of opinion between the judge of the district court and the judge of the circuit court. And it is not easy to see either why, if this construction be adopted, and this court now holds that a prisoner is rightfully detained by virtue of the Constitution and laws, any one of the magistrates named in the *habeas corpus* act may not afterwards release him because he is of opinion that the Constitution and laws have been violated. That man cannot be said to be convicted in violation of the Constitution or the law who is convicted before a tribunal which has general jurisdiction of offenses cogni-

zable under such Constitution and law. An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous.

Ex parte Watkins, 3 Pet., 202.

But assuming that the constitutionality of the statutory provisions, under which the petitioners were tried and convicted in the circuit court, may be inquired into in a proceeding on *habeas corpus*, we contend that those provisions are valid.

The statutory provisions under which the applicants were convicted are contained in the following sections of the Revised Statutes:

"SEC. 5515. Every officer of an election at which any Representative or Delegate in Congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, Territorial, district, or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof; or who violates any duty so imposed; or who knowingly does any acts thereby unauthorized, with intent to affect any such election, or the result thereof; or who fraudulently makes any false certificate of the result of such election in regard to such Representative or Delegate; or who withholds, conceals, or destroys any certificate of record so required by law respecting the election of any such Representative or Delegate; or who neglects or refuses to make and return such certificate as required by law; or who aids, counsels, procures, or advises any voter, person, or officer to

do any act by this or any of the preceding sections made a crime, or to omit to do any duty the omission of which is by this or any of such sections made a crime, or attempts to do so, shall be punished as prescribed in section fifty-five hundred and eleven."

"SEC. 5522. Every person, whether with or without any authority, power, or process, or pretended authority, power, or process, of any State, Territory, or municipality, who obstructs, hinders, assaults, or by bribes, solicitation, or otherwise, interferes with or prevents the supervisors of election, or either of them, or the marshal or his general or special deputies, or either of them, in the performance of any duty required of them, or either of them, or which he or they, or either of them, may be authorized to perform by any law of the United States, in the execution of process or otherwise, or who, by any of the means before mentioned, hinders or prevents the free attendance and presence at such places of registration, or at such polls of election, or full and free access and egress to and from any such place of registration or poll of election, or in going to and from any such place of registration or poll of election, or to and from any room where any such registration or election or canvass of votes, or of making any returns or certificates thereof, may be had, or who molests, interferes with, removes, or ejects from any such place of registration or poll of election, or of canvassing votes cast thereat, or of making returns or certificates thereof, any supervisor of election, the marshal, or his general or special deputies, or either of them; or who threatens, or attempts, or offers so to do, or refuses or neglects to aid and assist any supervisor of election, or the marshal or his general or special deputies, or either of them, in the performance of his or their duties, when required by him or them, or either of them, to give such aid and assistance, shall be liable to instant arrest without process, and shall be punished by imprisonment not more than two years, or by a fine of not more than three thousand dollars, or by both such fine and imprisonment, and shall pay the cost of the prosecution."

In support of the validity of the provisions under which the convictions were had, the following points are submitted:

I. Congress has full and unqualified power to regulate the manner of holding elections for members thereof.

This power is derived from section 4, article 1, of the Constitution, which provides: "The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators."

From this provision it is that the States themselves derive all their power to enact laws prescribing the time, place, and manner of holding elections for Representatives in Congress; and it will be observed that the power given to Congress touching this subject is as broad as that given to the States. In the grant to the States the language employed would seem to make it imperative upon them to exercise the power conferred; while in the grant to Congress the exercise of the power is left to the discretion of that body. Yet this discretion is subject to no restriction whatever. According to the terms of the grant, Congress may "at any time," by law, *make* regulations prescribing the time, place, and manner of holding such elections, or may *alter* any regulations of that character which have been enacted by the legislatures of the States; and regulations enacted by Congress pursuant to this grant become by the Constitution the supreme law of the land. Therefore should Congress make regulations covering the whole subject-matter of the grant, all State laws on the same subject-

matter would thereby be rendered inoperative and void. So if Congress alter the regulations of the States, by the enactment of regulations supplemental thereto or otherwise, only such part of the State regulations would remain valid as were unaffected by the legislation of Congress.

The scope and effect of the provision of the Constitution above quoted are very forcibly presented in a report from the minority of the Committee of Elections of the House, in the Thirty-eighth Congress. (See Reports of Committees of the House, first session Thirty-eighth Congress, No. 60.) Respecting that provision it is there said: It confers all necessary authority over the subject by the terms "to regulate the times, places, and manner of holding elections for Senators and Representatives." It gives to the legislatures of the States and to Congress, both, the *power* to make these regulations; and to Congress, also, the further distinct and important power *to alter at any time* such regulations as the States may make. It *commands* the legislatures of the States to execute the power with which they are invested; but it *confides* to Congress the *discretion* to *exercise*, or not, either of the powers intrusted to it at all times. No legislation of the States can prevent Congress from acting on this subject, either in the form of *making* these regulations or *altering* those of the State legislatures; nor can the States *qualify* or *circumscribe* that action in the one mode or the other, whatever it may be. But Congress, by executing its power to *make* these regulations, may exclude, and wholly put an end to, the jurisdiction of the State legislatures; or, in exercising its other power *to alter* the State regulations to *any extent*, it may allow that jurisdiction to operate within as large

or small limits as it may adjudge to be proper; or it may leave to these legislatures the exercise of all power over the subject by itself abstaining from all legislation relating to it. But when Congress does legislate, either to *make* these regulations or to *alter* such as the State legislatures may have prescribed, just so far as it does act its authority is absolute, paramount, and exclusive. This character would be imparted to its action by the second clause of the sixth article of the Constitution. In addition, the discretionary power with which Congress is invested *to make* these regulations, or to *supervise and alter* those of the State legislatures *at all times*, stamps its legislation in the premises with an overruling supremacy.

This power of Congress to alter the laws of the States is isolated. It is confined to their regulations of the times, places, and manner of holding Congressional elections, and extends to no other class of their legislation. But the authority of the States over this complex matter the Constitution makes subject at all times to the freest exercise on the part of Congress of its power to alter these State laws. When Congress acts there are not two distinct and independent systems of legislation; but by force of the Constitution it becomes one both of blended jurisdiction and legislation; and any alteration it may make of the State laws has the identical effect it would have if made by the State legislature. The system is simple and harmonious. If Congress pass a law which, either in terms and effect, amounts to an alteration of the State regulations, to its full extent the latter, by operation of the Constitution, give place, and the law of Congress is substituted.

In volume 2 of Curtis's History of the Constitution,

referring to the above-quoted section of the Constitution, it is observed: "This provision originated with the committee of detail; but, as it was reported by them, there was no other authority reserved to Congress itself than that of altering the regulations of the States; and this authority extended as well to the place of choosing the Senators as to all the other circumstances of the election. In the convention, however, the authority of Congress was extended beyond the alteration of State regulations, so as to embrace a power to make rules as well as to alter those made by the States. But the place of choosing Senators was excepted altogether from this restraining authority and left to the States. Mr. Madison, in his minutes, adds the explanation that the power of Congress to *make* regulations was supplied in order to enable them to regulate the elections, if the States should fail or refuse to do so. But the text of the Constitution, as finally settled, gives authority to Congress at 'any time' to 'make or alter such regulations;' and this would seem to confer a power which, when exercised, must be paramount, whether a State regulation exists at the time or not."

See also volume 1, Story on Const., section 815 *et seq.*, wherein are presented the leading considerations for leaving it to the discretion of Congress to determine when and to what extent the power referred to should be exercised. Also the Federalist, Nos. 58 and 59.

II. The power of Congress to regulate the manner of holding elections for its members includes authority to adopt whatever measures may be deemed necessary or expedient to conducting such elections and determining the result thereof.

This proposition covers the enactment of laws concerning the registration of voters, the casting and canvassing of votes, the declaration of the result, &c., and also providing for the execution of these laws through officers charged with this duty.

It is submitted that if a State should neglect or refuse to make any regulations on the subject of such elections, and Congress should in consequence supply regulations of its own, the latter regulations, in order to effect their purpose, must of necessity embrace the whole process of election; and, in this view, as well might their requirements extend to the registration of voters as to the casting and canvassing of votes. But in the contingencies adverted to (the neglect or refusal of the State) the power of Congress over this subject would be no greater than it would be where such contingencies did not exist, *i. e.*, where regulations were already provided by the State. As these regulations of the State might be wholly superseded by others enacted by Congress in the exercise of that power, so Congress might alter them by making additions thereto or otherwise, in the exercise of the same power; and alterations of State regulations so made by Congress might be limited to any one of the subjects to which such regulations applied (whether it be the registration of voters, the casting or canvassing of votes, the declaration of the result, &c.), or they might be extended to the whole of those subjects.

When the laws of the State as to the election of members of Congress are altered by Congress, these alterations are, as it were, engrafted upon the State laws, so that together they form a complete whole.

Unquestionably, Congress has the right to provide officers for carrying into effect such regulations as it may adopt, in the exercise of the power referred to. In United States *vs.* Clayton (2 Dill., 227) it is said by the court: "Under the Constitution (art. 1, sec. 4), Congress has the undoubted power to provide its own officers for the holding and conduct of Congressional elections."

III. Congress can punish any violation of the laws enacted under the aforesaid power, and also any interference with the officers charged with the execution of such laws.

Power is expressly given to Congress by the Constitution to make all laws which shall be necessary and proper for carrying into execution all other powers granted thereto. Nearly all the criminal legislation of Congress rests upon that power.

Thus Congress has power to levy and collect taxes, duties, imports, and excises; and, as necessary and proper for carrying into execution this power, the numerous punishments found in the revenue laws were enacted. Again, Congress has power to regulate commerce; and, as necessary and proper for carrying this power into execution, the various penal provisions in the regulations established thereunder were enacted. Again, Congress has the power to establish post-offices and post-roads; and the statutes which punish the many offenses relating to the postal service were enacted, as necessary and proper for carrying into execution the last-mentioned power.

United States *vs.* Coombs, 12 Pet., 78.

United States *vs.* Fox, 95 U. S., 670.

Ex parte Jackson, *supra*.

So Congress, being invested with power to regulate the manner of holding elections for members thereof, can enforce the regulations which it may prescribe thereunder by punishing those who violate them, or who interfere with the officers while engaged in executing them.

United States *vs.* Quinn, 8 Blatch., 64.
United States *vs.* Anthony, 11 Blatch., 200.
United States *vs.* Hirchsfield, 13 Blatch., 330.
U. States *vs.* Hendric, 2 Saw., 476,479.
U. States *vs.* O'Neill, 2 Saw., 481.
U. States *vs.* Johnson, 2 Saw., 482.
U. States *vs.* Souders, 2 Abbott's U. S. Rep., 456.

IV. The statutory provisions under which the convictions were had are appropriate for carrying into effect the power granted to Congress to regulate the manner of holding elections for Representatives.

What those provisions are is to be ascertained by an examination of the specific charges on which the petitioners were convicted. Of these charges (as shown by the indictments and proceedings thereon) a synopsis will now be given.

The petitioner Bowers was convicted on the *second* count in the indictment against him, which charged that he—

"Unlawfully did obstruct, hinder, and by the use of his power and authority as such judge as aforesaid (which judge he then and there was) interfere with and prevent the said supervisor of election in the performance of a certain duty in respect to said election required of him, and which he was then and there authorized to

perform by the law of the United States in such case made and provided, to wit, that of personally inspecting and scrutinizing at the beginning of said day of election and of the said election the manner in which the voting was done at the said poll of election, by examining and seeing whether the ballot first voted at said poll of election was put and placed in a ballot-box containing no ballots whatever, contrary to the 5522d section of said statutes," &c.

The petitioner Burns pleaded guilty to and was thereupon convicted of all the charges against him, in manner and form as laid in the indictment, which contained four counts, as follows:

The *first* count is similar to the second count in the indictment against Bowers quoted above.

The *second* count charged that he—

"Unlawfully at the said election did hinder and prevent the free attendance and presence of the said James McKenney (who was then and there such supervisor of election as aforesaid in the due execution of that office) at the said poll of said election, to wit, at and within the room where the same poll of election was then and there had and held, by then and there refusing and denying to admit him into the same room, and forcibly keeping him out of the same, contrary to the said 5522d section," &c.

The *third* count charged that he—

"Unlawfully at the election aforesaid did obstruct, hinder, assault, and by force and violence interfere with the said David Duncan (who was then and there such special deputy marshal as aforesaid in the due execution of that office) in the performance of the duty of him required, and which he was then and there by the said 2022d section authorized to perform, that is to say, the duty of then and there at the said election arresting and taking into custody and before the chief supervisor of elections for the said district, the said Martin C. Burns

for committing the offences upon him respectively imposed in the first and second counts of this indictment, contrary to the said section 5522," &c.

The *fourth* count is similar to the third.

The petitioner Coleman was convicted on all the counts (three in number) in the indictment against him.

The *first* and *second* counts are similar to the second and third counts in the indictment against Burns.

The *third* count charged that he—

"Knowingly and unlawfully did a certain act not then and there authorized by any law of the State of Maryland, and not then and there authorized by any law of the United States, by then and there fraudulently and clandestinely putting and placing in the ballot-box of the said voting precinct, twenty and more ballots within the meaning of section 5514 of said Statutes, before the ballots voted at said election in said precinct and lawfully deposited in the said ballot-box had been counted, and after the voting of certain of the same, with intent then and there and thereby to affect the said election and the result thereof, contrary to the statute in such case made and provided, to wit, to section 5515 of said Revised Statutes," &c.

The petitioner Tucker was convicted on two counts in the indictment against him, the *second* and *fifth*. The second count is similar to the second count in the indictment against Burns, and the fifth count is similar to the third count in the indictment against Coleman.

The petitioner Siebold was convicted on the *eighth* count in his indictment, which is similar to the third count in the indictment against Coleman.

It will be seen that all of these counts stand either on section 5515 or on section 5522 of the Revised Statutes.

The following presents so much of section 5515 as is made the foundation of the counts framed upon it:

"*Every officer of an election* at which any Representative * * * in Congress is voted for, * * * appointed or created by or under any * * * State * * * law or authority, * * * *who knowingly does any acts thereby* [by any law of the United States or of any State] *unauthorized, with intent to affect any such election, or the result thereof,* * * * shall be punished as prescribed in section fifty-five hundred and eleven."

And the following presents so much of section 5522 as is made the foundation of the counts framed upon it:

"*Every person*, whether with or without any authority, power, or process, or pretended authority, power, or process, of any State, * * * *who obstructs, hinders,* * * * *interferes with, or prevents* the supervisors of election, or either of them, or the marshal or his general or special deputies, or either of them, *in the performance of any duty required* of them, or either of them, *or which* he or they, or either of them, *may be authorized to perform by any law of the United States*, in the *execution of process* or *otherwise*, or *who* * * * *hinders or prevents the free attendance and presence at* * * * *such polls of election*, or *full and free access and egress* * * * *to and from any room, where any such election* * * * *may be had*, * * * [of] any supervisor of election, the marshal, or his general or special deputies, or either of them, * * * shall be punished by imprisonment not more than two years, or by a fine of not more than three thousand dollars, or by both such fine and imprisonment, and shall pay the cost of the prosecution."

With regard to section 5515, the only question that arises here is this: Can State officers of an election at which members of Congress are chosen be subjected to punishment by Congress for the commission of *acts unauthorized by any law either of the State or of the United*

States, where the acts directly relate to such election, and are committed *with wrongful intent to affect the same or the result thereof?*

We submit in answer, that the matter to which the unauthorized acts relate (a Congressional election) being one in respect to which Congress has power to legislate, and therefore within the jurisdiction of the United States, such acts may be punished by Congress—unless the officers of election can claim exemption on the ground (not that they acted pursuant to a law of the State, for the case supposes the contrary, but) that they derived their appointments from the State!

In United States *vs.* Fox (95 U. S., 672) the principle is fully recognized that an act committed within a State, which has relation to any matter that concerns the United States and is subject to the control of Congress, can be made an offense against the United States. And as to the claim of exemption by the election officers on the ground mentioned, the principle upon which this rests would give immunity from punishment to every State official, high or low, who might violate a United States law. It will hardly be contended that officers or employés of a State are, by their position, made irresponsible to the criminal laws of the United States.

Passing now to section 5522, the question which arises thereon is, Whether a State officer of an election at which members of Congress are chosen can be punished by Congress, (1) for *obstructing*, *hindering*, or *interfering with* (by the use of his power and authority as such State officer) certain United States officers (viz, supervisors of election, the marshal, and his general and special deputies) in the *performance of any duty required* of those

officers, or which they *may be authorized to perform*, respecting such election, *by a law of the United States*, or (2) for *hindering* or *preventing* (by the use of his power and authority as such State officer) the *free attendance and presence* of those officers at the *poll of such election*, or free access and egress to and from any room where such election is had, in the performance of any duty thereat devolved upon them by a law of the United States.

The answer to this is obvious. If Congress, in the exercise of the power to regulate the manner of holding elections for Representatives, can create officers to supervise the voting and canvassing of the votes at such elections under regulations of its own (a proposition which we think is incontrovertible), it can enforce these regulations by means of penalties or punishments. Authority to make law impliedly confers authority to impose penalties for violation of the law. And the penal provisions enacted to the end of enforcing such regulations, it is submitted, may be made to embrace all persons alike—those acting with equally as well as those acting without authority or power from any State. In this connection it is to be observed that the authority or power derived from the State is apparent only, not real, in so far as it comes in conflict with the regulations of Congress and their enforcement; for these regulations, being paramount, to that extent annul the authority or power given by the State.

See, in reference to this subject, the latter part of the opinion of Justice Strong in the case of United States *vs.* Given, 17 Int. Revenue Record, p. 190; also the cases cited *supra* under point III.

Upon the foregoing considerations it is submitted that the application of the petitioners for the writ of *habeas corpus* should be denied.

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